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1969		
Apr. 22	Filed petition for writ of habeas corpus	
22	Filed Decision & Order allowing filing in forma pauperis & Order that respondent show cause why a writ should not issue—Burke, J. (notice to petitioner) ret. 5/12/69 at Roch.-subm.	F-91
July 1	Filed Findings of Fact, Conclusion of Law & Order denying writ, denying certificate of probable cause and denying appeal in forma pauperis but allowing filing notice of appeal without payment—Burke, J. (notice to petitioner & Mr. Jenczka)	F-94
10	Filed Notice of Appeal (copy mailed to Mr. Jenczka and to Clerk, CCA with copy of docket entries)	
Oct. 8	Filed copy of order of CCA granting motion for certificate of probable cause, for leave to proceed in forma pauperis and for assignment of counsel. (Record to be retained for use of Bruce A. Carpenter, Esq., assigned counsel, until he files brief and appendix)	

Chronological List of Relevant Docket Entries.

Date	Proceedings	Date Order or Judgment Noted
1970		
Jan. 12	Original papers, exhibits, docket entries and Clerk's certificate mailed to Clerk, CCA	
1971		
May 27	Filed opinion & judgment of CCA reversing District Court order with costs to be taxed against the Appellee	
June 2	Filed Judgment on Order of Court of Appeals—Burke, J. (notice & cy. to petitioner and Mr. Lefkowitz, Bflo.)	F-117
17	Filed Order remanding petitioner to the custody of Monroe County Sheriff for re-sentence in the Monroe County Court—Burke, J. (notice to petitioner & Mr. Lefkowitz, Bflo.)	F-117

Petition for Writ of Habeas Corpus.

IN THE

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK,
ROCHESTER, NEW YORK.

UNITED STATES OF AMERICA
ex rel. WILLIAM C. STUBBS
No. #22393

Petitioner,

vs.

HON. VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, N. Y.,

Respondent.

Comes now the Petitioner, William C. Stubbs, in the above titled cause, who was tried, convicted and sentenced to Attica State Prison at Attica, New York, by the Monroe County Criminal Court, Rochester, New York, October 7th, 1966 for the crimes of possession of a loaded firearm in violation of former Penal Law § 1897, subd. 2. for which he received thirteen to fourteen years in Attica State Prison, Attica, New York, and for Assault in the first degree in violation of former Penal Law § 240, for which he was sentenced to nineteen to twenty years in Attica State Prison, Attica, New York.

The grounds for this petition are that the Petitioner was deprived of the effective assistance of counsel and errors in deprivation of his rights under New York Law and under the United States Constitution, namely the 4th, 5th, 6th and 14th Amendments of the Constitution of the United States.

The reasons why the Petitioner's constitutional rights are violated are set out more fully below.

(1)

The Petitioner and Shirley Miller were arrested without probable cause—see Point (1) Exhibit E and Petitioner's car was illegally searched without a search warrant, also Exhibit E Point I of this petition.

(2)

The evidence offered as to both assault and possession of a weapon was insufficient as a matter of law, the verdict was also against the weight of the evidence, see Point (2) Exhibit—F—.

(3)

The Police Lieutenant was improperly permitted to testify, to inflammatory conclusions made by him before the arrest, see Point (3) Exhibit—G—

(4)

The erroneous instructions by the trial Judge, require a new trial, see Point (4) Exhibit—H—

(5)

The prosecuting attorney was improperly permitted to indulge in inflammatory summation, see Point (5) Exhibit—I—

(6)

The trial Judge committed prejudicial error by permitting the Jury to take Exhibits into the Jury room, when the defendant refused to consent to this, see Point (6) Exhibit—J—

(7)

At the trial to prove the defendant's identity as a prior felon the trial Judge committed prejudicial error by refusing the defendant peremptory challenges in selection of the Jury, see Point (7) Exhibit—K—

(8)

The trial judge improperly disclosed to the Jury trying the identity issue the fact that the defendant stood convicted of a felony in New York, see Point (8) Exhibit—L—

(9)

The previous conviction in Tennessee was unconstitutionally obtained and should not have been made the basis for increased punishment, see Point (9) Exhibit—M—

(10)

The sentence is too severe and should be reduced, see Point (10) Exhibit—N—

(11)

Shirley Miller and William Stubbs were both indicted for illegal possession, Shirley Miller pleaded guilty to illegal possession, see Exhibit—A—Indictment No. 198.

(12)

Motions filed by defendant before sentencing. Motions for the dismissal or retrial of both charges, see Exhibit—B*

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* The certificate of probable cause granted by the United States Court of Appeals for the Second Circuit was limited to the issue of the constitutionality of the Tennessee conviction, and this was the sole issue considered by the court. Omitted portions of this petition deal with petitioner's attack on his Monroe County conviction.

* * *

POINT "IX"

The previous conviction in Tennessee was unconstitutionally obtained and should not have been made the basis for increased punishment.

POINT "X"

The sentence is too severe and should be reduced.

* * *

POINT 9—EXHIBIT M

The previous conviction in Tennessee was unconstitutionally obtained and should not have been made the basis for increased punishment.

Former Penal Law, § 1943 provides that a sentencing court in New York should under proper circumstances determine whether a previous conviction was unconstitutionally obtained. The trial Judge in the present case entered into such an inquiry (I 44-75) determining that no constitutional rights of the defendant were in any way infringed on the previous conviction (I 73-75).

The predicate felony proved was a conviction for murder in the first degree in the state of Tennessee in 1964. There was proof that a Mr. and Mrs. Holm were driving through Tennessee from there home in Texas. Stubbs v. State, 216 Tenn. 567, 570; 393 S.W. 2d 150. They first encountered the defendant Stubbs at a roadside park where they had stopped to eat lunch (216 Tenn. 567, 570-571). According to the testimony of Mr. Stubbs, he forced the couple at pistol point to get in the back seat of their automobile, and he drove the automobile (216 Tenn. 567, 571). Mrs. Holm was shot as was Mr. Holm. Mrs. Holm died.

The crucial witness in the Tennessee case, thus, was Mr. Holm. He would be able to say whether it was the defendant or another, perhaps Mr. Holm himself, who shot

Mrs. Holm. Mr. Holm was in Sweden at the time of the defendant's trial in 1964 (216 Tenn. 567, 574).

The appellant's Tennessee conviction was unconstitutionally obtained, because a transcript of Mr. Holm's testimony at an earlier trial of the defendant was admitted (216 Tenn. 567, 574, 516).

Ordinarily, the use of a transcript of earlier testimony would be a question of evidence to be determined by the law of Tennessee. See the uniform law to secure attendance of witnesses. Tenn. Code Annotated § 40-2419 et seq. The special factor present which makes the use of Mr. Holm's earlier testimony an error of constitutional proportions is that a federal district court had conclusively determined that the constitutional rights of the defendant at the original trial had been violated, "Because counsel at first trial had not been given a chance to investigate background of such witness [Mr. Holm]." (216 Tenn. 567, 569, 570, 576).

The right of cross examination is included in the right of an accused in a criminal case to confront the witnesses against him secured by the Sixth Amendment. Pointer v. Texas, 380 U.S. 400, 404, 406-407; Douglas v. Alabama, 380 U.S. 415, 419; Bruton v. United States, U.S. 88 S.Ct. 1620, 1622. The right of cross examination secured by the confrontation clause of the Sixth Amendment is made applicable to the states by the Fourteenth Amendment. Roberts v. Russel, U.S. 88 S. Ct. 1921, 1922.

Since the first conviction of the defendant Stubbs in Tennessee was unconstitutionally obtained because he was effectively denied the right to cross examine the witness (Mr. Holm) the second trial in Tennessee is tainted by unconstitutionality for the identical reason. Mr. Stubbs has never been confronted with his principle accuser.

The decision of the Tennessee Supreme Court (Stubbs v. State, 216 Tenn. 567, 393 S.W. 2d.150) is not controlling, especially since no authority was cited on this important

constitutional question. The only case cited, Hall v. State, 65 Tenn. 522, held that it was error to let a person detail what he heard a witness on a committing trial state when such witness was still living, merely because he was not in attendance at the trial and was a resident of another state. The defendant Stubbs should not have been sentenced as a second felony offender (S 16-17).*

POINT 10—EXHIBIT N

The sentence is too severe and should be reduced.

The defendant was sentenced upon the conviction for unlawful possession of a loaded revolver to a term of imprisonment of from thirteen to fourteen years (S 16). And was sentenced upon the assault conviction to imprisonment for a term of nineteen to twenty years (S 17). The sentences were imposed upon the defendant as a second felony offender, and were directed to run consecutively (S 16-17). The trial judge said to the defendant at the time of sentence

> "... You have indicated that you're totally beyond the capacity of rehabilitation, rehabilitative efforts by any institution anywhere. . . .
>
> This court has never before imposed a maximum sentence. This court is doing so now in full realization of its impact . . ." (S 15, 16)

Sentencing is one of the most difficult problems that confront the judge of a criminal court. People v. Silver, 10 AD 2d 274, 199 N.Y.S. 2d 254. In reviewing the propriety of a sentence in a particular case, the court must give consideration to all the elements involved concerning the

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* The transcript of the minutes of the sentencing imposed on October 7, 1966 are separately numbered and follow the 78th page of the trial on the question of identity and constitutionality.

crime itself and the wrongdoer. People v. Cotter, 25 AD 2d 609, 267 N.Y.S. 2d 679 (Memorandum).

In People v. Silver, 10 AD 2d 274, 199 N.Y.S. 2d 254, in reducing to a suspended sentence with a year's probation an original penitentiary sentence of one year upon a conviction of grand larceny in the first degree (for which the maximum term of imprisonment could of been ten years) the court said:

> "Great care should therefore be exercised in imposing judgment for the very obvious reason that vast differences exist among individual offenders and there personal capacity for rehabilitation.
>
> The prime aim of socialized justice, and inherent in its administration in our criminal courts today, is a dispassionate and conscientious evaluation of the unique aspects of the convicted offender's total personality, his intelligence, his character structure, his demonstrated ability to conform, his capacity to accept our social disciplines and limits, and his overall stability. Such an inventory of his assets and liabilities is indispensable to a judicial determination in selected cases of whether accidental or situational offender's with promising potential can be aided to readjust to a normal life in the community without the disruptive, and sometimes destructive, effects of imprisonment.
>
> In sum, a sentence must not only encompass the community's condemnation of the defendant's misconduct, but must also evaluate the possibilities of the rehabilitation of the defendant's as a useful and responsible member of the community." (199 N.Y.S. 2d 254, 256)

The facts disclosed in Stubbs v. State, 216 Tenn. 567, 393, S.W. 2d 150 do not show the defendant, even assuming

that he was guilty of the Tennessee crime, to have necessarily been utterly depraved, there is a suggestion about the case that the defendant may not have been fully aware of the fatal events (216 Tenn. 567, 571). It was probably wrong also, for the trial judge in the present case to have concluded that the defendant was "totally beyond the capacity of rehabilitation, rehabilitative efforts by any institution anywhere" (S15). If the trial judge's sentiments are true, it is a very sad commentary upon the current correctional practices.

It is possible that the jury would not have convicted the defendant for having the loaded revolver in the glove compartment of his automobile. Under the instructions given to the jury there verdict is consistant with there having found that the only possession of which the defendant was guilty was that occurring at the same time as the assault. It is of course impossible for one to commit an assault by shooting a firearm (in violation of former Penal Law § 240) without at the same time having in his possession a "firearm which is loaded with ammunition" (in violation of former Penal Law § 1897).* Accordingly, by imposing consecutive sentences the trial judge may well have violated former Penal Law § 1938. See People ex rel. Maurer v. Jackson, 2 NY 2d 259, 159 N.Y.S. 2d 203. Compare People ex rel. Nickerson v. LaVallee, 17 AD 2d 874, 233 N.Y.S. 2d 67 (3d Department, memorandum). The court has the power to correct the excessiveness, C.C.A. § 543.

The trial judge imposed, effectively the greatest possible sentence for anyone convicted of the crimes with

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* Absence of a license is not an element of the crime of possession any longer, if it ever was. See Former Penal Law, § 1900 subd. A(3). This is a matter of defense. If absence of a license were an element of the crime, the defendant would have argued that the People failed to prove it.

which the defendant was charged. He is to serve a total term of imprisonment of from thirty-two to thirty-four years. This is the most that could have been imposed upon a defendant who, let us say, deliberately attacked a small child with a machine gun and hit the child or caused a permanent state of shock or mental breakdown. It would seem desirable in the scheme of criminal punishment to impose a less severe sentence where the actual, accomplished harm to another member of society was slight.

The crime for which the defendant was prosecuted may seem to us particularly horrible. The crime occurred on a sedate city street, the kind we live on. It did not take place in a hidden corner of skid row or among the debris of a ghetto, but because this particular crime may seem to strike close to home, the defendant should not be made to serve such a harsh, harsh, sentence.

Conclusion

• • •

Summary

The petitioner respectfully submits to the court the following questions, can the petitioner, in disregard to his fundamental constitutional rights be arrested, without probable cause, have his automobile searched without permission or a warrant, have the court-appointed attorney collaborate with the district attorney against him, have a prejudicial judge let the district attorney and a witness use inflammatory statements and hearsay, and the Judge himself who lets his prejudice interfere with the laws and rules of his court, denied relief on account of the ineffective assistance of counsel, can this be just? The answer is no.

The petitioner contends that he has shown the Honorable court legal and sound proof that his constitutional rights have been severely violated and respectfully requests

the Honorable court to issue an order out and under the seal of this Honorable court to the respondent the Hon. Vincent R. Mancusi, warden, Attica State Prison, Attica State Prison, Attica New York to have the petitioner brought before the court on a day thereof and for the respondent to show cause why the petitioner should not be released from his unlawful detention.

The undersigned swears that all facts, statements, exhibits and points presented in this petition are true to the best of his information, knowledge and belief.

Respectfully submitted,

WILLIAM C. STUBBS,
Petitioner.

(Sworn to before me this 11 day of March, 1969.)

RALPH J. BOTTONE,
RALPH J. BOTTONE,
Notary Public.

Residing in Wyoming County.
My Commission expires March 30, 1969

(Affidavit of service omitted in printing.)

Motion for Leave to Proceed in Forma Pauperis.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK
ROCHESTER, NEW YORK.

[SAME TITLE]

COUNTY OF WYOMING }
TOWN OF WYOMING } ss.:
STATE OF NEW YORK }

SIR:

The Petitioner moves for an order permitting him to proceed in this court in forma pauperis without prepayment of fees and cost or security therefor. Directing that the expenses of printing of the record on appeal for petition of habeas corpus be paid for by the United States, and for assignment of counsel to represent him, and granting such other relief as the court believes proper, it is so prayed.

Respectfully submitted,

WILLIAM C. STUBBS
Petitioner

(Jurat omitted in printing.)

Affidavit in Support of Motion to Proceed in Forma Pauperis.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK,
ROCHESTER, NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WYOMING }
TOWN OF ATTICA }

After first being sworn, William Stubbs says that

1. He is the petitioner, this is a petition for a writ of habeas corpus to the United States District Court, Western District of New York State, Rochester, New York, in relation to a judgment of conviction of the County Court, Monroe County, for the crimes of assault in the first degree in violation of former Penal Law § 240, and possession of a loaded firearm, in violation of former Penal Law § 1897, subd. 2. The grounds for this petition are that the petitioner was deprived of the right to the effective assistance of counsel upon his appeal to the Appellate Division and that errors in deprivation of his rights under New York Laws and under the United States Constitution occurred at his trial.

2. He believes he is entitled to redress.

3. He was assigned counsel by the New York Courts to conduct both the trial and the appeal. Mr. Bruce K. Carpenter volunteered his services in connection with a motion for reargument of the appeal to the Appellate Divi-

sion and with an application for leave to appeal to the New York Court of Appeals and for writ of certiorari to the Supreme Court of the United States.

4. He owns no property and has no savings (except an account maintained at Attica State Prison with a balance of less than $15.00.

5. The undersigned has been imprisoned pursuant to the judgment of conviction for more than two years, is unemployed and has no source of income.

Respectfully submitted,

William C. Stubbs
Petitioner

(Jurat omitted in printing.)

Notice of Motion.

UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT,
STATE OF NEW YORK,
ROCHESTER, NEW YORK.

[SAME TITLE]

COUNTY OF WYOMING }
TOWN OF ATTICA }
STATE OF NEW YORK }

Sir:

Please take notice that upon the annexed, certified petition of William C. Stubbs, duly sworn and certified this 31 day of March, 1969

The undersigned will move this Honorable Court at part thereof at a motion term to be heard in the courtroom of the United States District Court, Western District of New York State at Rochester, N. Y. State of New York at 10 o'clock in the forenoon of the same day or as soon thereof, that this motion can be heard, granting petitioner's plea for the following records and affidavits:

(1) The Grand Jury judgment roll of the People v. Shirley Miller and William Stubbs, of April 29th, 1966.

(2) Certified copy of petitioner's trial minutes.

(3) Certified copy of co-defendant Shirley Miller's pleading minutes on arraignment.

(4) Certified copy of petitioner's court appearances from April 1966 through September, 1966.

(5) Certified copy of information, of co-defendant Shirley Miller.

(6) Copy of Probation Report on petitioner. It is so filed.

Respectfully submitted,

WILLIAM C. STUBBS,
Petitioner.

(Jurat omitted in printing.)

Affidavit in Support of Motion.

UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT
STATE OF NEW YORK,
ROCHESTER N. Y.

[SAME TITLE]

COUNTY OF WYOMING
TOWN OF ATTICA
STATE OF NEW YORK

PLEASE TAKE NOTICE upon this annexed petition of William C. Stubbs, certified this 31 Day of March 1969, the above named petitioner deposes and says,

That this petition is interposed under the Applicable Provisions of section 198-199 of the C.P.L.R. and also under Article XIV of the constitution of the United States, wherein petitioner seeks to be granted certified copies of

records and affidavits aforementioned and very pertinent to the People of the State of New York v. William Stubbs and Shirley Miller.

Petitioner further contends and says that this Honorable Court in its inherent discretionary wisdom can invoke its authority under the aforementioned provisions of the C.P.L.R. and Article XIV of the constitution of the United States of America, and grant to the petitioner the records pleaded for in the instant petition.

Petitioner respectfully requests that an order issue out and under the seal of this Honorable court granting petitioner's motion by Forma Pauperous.

NOTICE

Petitioner has appealed in proper legal form for these records, two times in the Monroe County Court and was denied on both occasions, on Jan. 6, 1967, and Sept. 8, 1967, also in Feb. 1969 in the 4th App. Div. Petitioner is without legal council and needs these records for further legal court action.

Respectfully submitted,

WILLIAM C. STUBBS.

(Jurat omitted in printing.)

Order to Show Cause.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

U. S. ex rel. WILLIAM C. STUBBS,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison.

Petitioner pro se.

Filing in forma pauperis allowed.

The petitioner is held on a judgment of the Monroe County Court following a trial. He was sentenced on October 7, 1966. His claims as to the violation of his rights under the Federal Constitution are set forth in pages 9 and 10 of the petition and are 10 in number. The conviction was affirmed by the Appellate Division, 30 A.D. 2d 777. Reargument was denied, 30 A.D. 2d 932. The Court of Appeals of New York denied permission to appeal. Certiorari was denied February 24, 1969.

IT IS HEREBY ORDERED that the respondent show cause before this court on May 12, 1969, at 10 A. M. at the Federal Building, Rochester, N. Y., why a writ of habeas corpus should not issue, and produce for this court's examination the record on appeal to the Appellate Division and the briefs of the respective parties in the Appellate Division. The presence of the petitioner is not required on the return of this order to show cause.

HAROLD P. BURKE
Harold P. Burke
U. S. District Judge

April 21, 1969.

Decision and Order of the United States District Court for the Western District of New York, dated June 30, 1969, denying writ of habeas corpus and denying certificate of probable cause, is printed in the Petition for Writ of Certiorari at p. 13a.

Notice of Appeal.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT,
STATE OF NEW YORK.

Civ.-1969-136

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

WILLIAM C. STUBBS,

Petitioner.

SIR:

Please take notice that the petitioner, William C. Stubbs, above named, hereby appeals to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, from an order of the United States District Court for the Western District of New York State, Rochester, New York denying a petition for Writ of Habeas Corpus on June 30, 1969.

This petition of Habeas Corpus arose out of the conviction of the petitioner from the Monroe County Criminal Court, City of Rochester, County of Monroe, State of New York, for the crimes of assault in the first degree and illegal possession of an unlicensed revolver, October 7, 1966, after a trial by jury.

Petitioner, hereby appeals on the grounds that the aforementions convictions were obtained in violation of petitioner's constitutional rights and petitioner hereby appeals from each and every part of said conviction and from the whole thereof.

Respectfully submitted,

WILLIAM STUBBS
Petitioner

(Jurat omitted in printing.)

Affidavit of Forma Pauperis.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT,
STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

WILLIAM C. STUBBS,
Petitioner.

COUNTY OF WYOMING }
TOWN OF ATTICA }
STATE OF NEW YORK }

Sir:

Please take notice that the above named Appellant, William C. Stubbs being duly sworn according to law deposes and say that he is an American citizen by birth and that he is a resident of the State of New York.

Petitioner further deposes and says that he does not own any property either real or personal that could be converted into cash.

Therefore Petitioner claims to be a poor person as defined in Section 198-199 of the C.P.L.R. and respectfully requests that an order issue out and under the seal of this Honorable court granting Petitioner leave to proceed with his appeal by forma pauperous it is so prayed.

Respectfully submitted,

WILLIAM STUBBS
Petitioner

Sworn to before me
this 3rd day of July 1969

(Jurat omitted in printing.)

(Affidavit of Service omitted in printing.)

Certificate of Probable Cause.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of October, one thousand nine hundred and sixty-nine.

UNITED STATES ex rel. WILLIAM C. STUBBS,
Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison,
Respondent-Appellee.

A motion having been made herein by relator appellant pro se for a certificate of probable cause, for leave to proceed in forma pauperis and for the assignment of counsel.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted, limited to the issue of the constitutionality of the Tennessee conviction.

Bruce A. Carpenter of Buffalo, New York, Legal Aid Society, is assigned as counsel.

It is further ordered that counsel for relator-appellant shall be permitted to remove the original record from the files of this court for a period sufficient to prepare a brief and appendix for appeal and that said record shall be returned to this court no later than the date of the filing of appellant's brief and appendix.

(ILLEGIBLE),

(ILLEGIBLE),

(ILLEGIBLE),
Circuit Judges.

Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 126—September Term, 1970.

(Argued October 26, 1970 Decided April 19, 1971.)

Docket No. 34449

UNITED STATES OF AMERICA, ex rel. WILLIAM C. STUBBS,
Petitioner-Appellant,

against

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,
Respondent-Appellee.

Before:

MOORE, FRIENDLY and ADAMS,*

Circuit Judges.

Appeal from denial of petition for habeas corpus by the District Court for the Western District of New York, Harold P. Burke, *Judge,* challenging sentence imposed as second felony offender.

Reversed.

BRUCE K. CARPENTER, Dunkirk, New York (Woodin & Carpenter, Dunkirk, New York, of counsel), *for Petitioner-Appellant.*

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*United States Circuit Judge of the Court of Appeals for the Third Circuit, sitting by designation.

Decision of the United States Court of Appeals for the Second Circuit.

MARIA L. MARCUS, Assistant Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General of the State of New York, New York and Samuel Hirshowitz, First Assistant Attorney General, New York, New York, of counsel), *for Respondent-Appellee.*

ADAMS, *Circuit Judge:*

Relator Stubbs was convicted in Monroe County, New York in 1966 for first degree assault and possession of a firearm. The County Court considered a prior conviction of murder obtained against Stubbs in Tennessee, found him to be a second felony offender, and sentenced him to consecutive terms of imprisonment totalling thirty-two to thirty-four years.[1] Stubbs here challenges his sentence, alleging that his prior felony conviction in Tennessee was constitutionally invalid. The Honorable Harold P. Burke, District Judge of the District Court for the Western District of New York, denied Stubbs' application for a writ of habeas corpus, and relator appealed.

Stubbs was first convicted of a vicious murder in Tennessee in 1954. This conviction was vacated in 1964 when

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[1] Under former New York Penal Law, §§ 241, 1897, [present New York Penal Law §§ 120.10, 265.05 (McKinney 1967)], Stubbs could have been sentenced to a maxmum of seventeen years as a first felony offender on these charges. The sentence was increased under the authority of former Penal Law § 1941 (compare present § 70.10). Stubbs was also convicted of the felony of breaking and entering in Texas in 1953. As far as the record in the present case reveals, the 1953 conviction remains available as a predicate for increased punishment under § 1941. Present Penal Law § 70.10 would not govern resentencing because of the effective date expressed in § 5.05. Cf. *Gerberding* v. *Swenson*, 435 F.2d 368 (8th Cir. 1970).

the Honorable William E. Miller, United States District Court for the Middle District of Tennessee, found Stubbs to have been denied, because of late appointment, the effective assistance of counsel. *Stubbs* v. *Bomar,* Civil Action 3585 (M.D. Tenn., filed January 6, 1964). At retrial, the prosecution's primary witness did not appear, but his testimony from the first trial was read over defense objections, and Stubbs was convicted. This conviction was upheld by the Supreme Court of Tennessee. *Stubbs* v. *State,* 216 Tenn. 567 (1965).

The critical issue before us is whether relator's 1964 Tennessee conviction was obtained in violation of his right —under the Sixth Amendment to the Constitution—to be confronted with the witnesses against him, and thus was an improper predicate for increased punishment.[2]

The facts underlying the Tennessee conviction are as follows: Mr. and Mrs. Holm were driving through Tennessee on their way from Texas to Rhode Island for an eventual journey to Sweden. Stubbs asked Mr. and Mrs. Holm at a roadside park for a ride, but was refused. He then forced them at gunpoint to permit him to drive their car while the Holms rode in the back seat. Stubbs claimed that when they were near Bristol, Tennessee, he was suddenly struck on the head and he heard a loud bang, the car hit a tree and Stubbs then fled. The police were called to investigate the wrecked car, and they found Mrs. Holm dead by a gunshot wound; and Mr. Holm shot twice in the face. Stubbs was soon apprehended in a police road-block. From his hospital bed, Mr. Holm identified Stubbs as the man who shot him and his wife. Three days before his trial, three attorneys were appointed to defend Stubbs, and they requested and were refused a continuance to pre-

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[2] See *Burgett* v. *Texas,* 389 U.S. 109 (1967).

pare the defense. At trial, Mr. Holm was the state's primary witness, and Stubbs was convicted.

By the time of the 1964 retrial, Mr. Holm had become a permanent resident of Sweden, but had not relinquished his American citizenship. No effort was made by the state to obtain Holm's attendance at this trial. Instead, Holm's son was brought from Texas to testify that his father was presently residing in Sweden whereupon Holm's prior testimony was admitted over objection.[3] The propriety of the admission of that evidence, in light of *Barber* v. *Page*, 390 U.S. 719 (1968), and *California* v. *Green*, 399 U.S. 149 (1970), is here in question.[4]

As noted by the Supreme Court in *Green*, "the particular vice which gave impetus to the [Confrontation Clause] was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." 399 U.S. at 156. A traditional exception to the confrontation requirement has been the introduction of testimony of a witness who is now unavailable, but who previously testified subject to cross-examination at judicial proceedings against the same defendant. E.g., *Mattox* v. *United States*, 156 U.S. 237 (1895). While the scope of the Confrontation Clause is not coextensive with the rules of hearsay and their exceptions,[5]

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[3] *See generally* 5 Wigmore, *Evidence*, §§ 1396, 1404 (3d ed. 1940); *Note, Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966).

[4] In *Berger* v. *California*, 393 U.S. 314 (1969), the Supreme Court directed that *Barber* v. *Page* should "be given fully retroactive application."

[5] *California* v. *Green*, *supra*, at 155-156.

"'necessity'"[6] is a factor common to both that may justify the use of prior recorded testimony in limited instances of genuine unavailability. The test for such use is whether "the prosecutional authorities have made a good-faith effort to obtain [the witness'] presence at trial." *Barber* v. *Page, supra* at 725. No such effort was made here, and Holm's testimony was improperly admitted into evidence. Where there is no showing that a witness beyond the effective reach of a court's subpoena will refuse to return voluntarily to testify if requested, the prosecution may not introduce prior testimony without demonstrating a reasonable effort to secure his presence. Cf. *Virgin Islands* v. *Aquino*, 378 F.2d 540 (3rd Cir. 1967); *Owens* v. *Eyman*, 434 F.2d 1962 (9th Cir. 1970). Absence from the continental United States is not per se a sufficient reason to broaden the exception to the Confrontation Clause allowing the admission of prior testimony of a presently unavailable witness. For although there is a much greater chance that it will not be possible to bring before the court a witness residing abroad, "'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.'" *Barber* v. *Page, supra*, at 724, quoting with approval Judge Aldrich's dissent in the Court of Appeals, 381 F.2d 479, 481 (10th Cir. 1967).

New York urges that even if Holm's testimony was erroneously admitted in the 1964 trial, such error was harmless beyond a reasonable doubt within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967).[7] Relator answers that Judge Miller found Stubbs did not have effective assistance of counsel at his 1954 trial, so that his right of cross-examination may not have been satisfied

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[6] See *California* v. *Green, supra*, at 167, footnote 16.

[7] See also, *Note, Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814 (1970).

even initially. Judge Miller's decision, however, even if it were binding on New York, would not establish the ineffectiveness of the cross-examination of Holm, but only the prejudice to the totality of defense preparation from late appointment of counsel.

Nevertheless, it is clear as Stubbs' 1964 counsel recognized that Holm was not questioned regarding the core of Stubbs' defense—namely, that while Stubbs originally forced himself on the Holms, he gained their sympathy during the course of the trip and in effect became their guest. This claim was significant because even if Stubbs fired his pistol accidentally (he denied firing at all), he might still be found guilty of felony murder unless the felony of kidnapping had ended. Stubbs' story was given some plausibility by his testimony that he forced himself on the Holms from desperation and hunger; they made him welcome when he explained his motivation; Mrs. Holm suggested he put his gun on the seat to avoid it being seen while driving through a town; and they drove past a policeman without the Holms making any outcry. While all of the above may also be explained by the Holms' fear of Stubbs, we cannot declare the absence of any examination of Holm—the only eye-witness to the alleged crime—on this point to be harmless beyond a reasonable doubt. Compare *Burgett* v. *Texas, supra,* at 115 with *United States ex rel. Moore* v. *Follette,* 425 F.2d 925 (2nd Cir. 1970). Whether the test is one of overwhelming evidence or of untainted evidence,[8] the error of admitting Holm's testimony at Stubbs' second trial was central to Stubbs' conviction, rather than harmless to his case.

The dissent makes an appealing case for using the Tennessee conviction to augment on the New York sentence.

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[8] See 83 Harv. L. Rev. at 817-820.

It essentially employs the "bad man" approach. However, it fails to cite any cases to support such position and also fails to demonstrate where the cases relied upon here are either unearned or inappropriate.

MOORE, Circuit Judge (dissenting):

Here is presented an extraordinary example of "justice" dispensed by the federal courts. Stubbs, the appellant, released from a Texas penitentiary in June 1954, a few days later kidnapped at gunpoint in Tennessee a Mr. and Mrs. Holm and forced them to accompany him in their car. While on the road he murdered Mrs. Holm apparently "in cold blood" and attempted to murder Mr. Holm, wounding him twice. Stubbs was apprehended shortly thereafter at a roadblock. He tried to explain the blood on his clothing by attributing it to an accident while fishing. Stubbs was taken to the hospital to which Holm had been taken. There, in the presence of police officers and a doctor, Holm identified Stubbs as "the man that killed my wife and shot me."

Stubbs was indicted in the Criminal Court in Tennessee on July 8, 1954 and arraigned the next day, July 9, 1954. The Trial Judge immediately appointed three members of the County Bar to represent Stubbs. Although counsel moved for a continuance for additional time to prepare a defense (a practice not unusual for defense counsel), the trial was set for, and proceeded on, July 12, 1954.

In addition to other witnesses, Holm testified to the facts of the kidnapping, the murder of his wife and his own wounding. There is no indication in the record that Stubbs' counsel did not have a full opportunity to cross-examine Holm. The jury convicted Stubbs or four indictments,

murder in the first degree, assault with intent to murder and two counts of kidnapping. He was sentenced to concurrent terms of 99 years and 21 years.

Ten years passed. Stubbs by habeas corpus petition then advanced the claim in a federal court in Tennessee that his 1954 conviction should be set aside. The federal judge, in my opinion quite erroneously, granted the petition on the ground that "the petitioner was denied effective representation by counsel" in that "Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial" and, declaring the first trial "null and void," remanded Stubbs for further prosecution.

On the second trial in 1964 the State called fifteen (15) witnesses, including the three (3) Highway Patrolmen and a Police Investigator who were present in Holm's hospital room on June 11, 1954 and who testified to Holm's identification of Stubbs as the murderer and assailant. The testimony of another eye-witness who had died in the ten-year interval was introduced from the transcript. Holm had returned to Sweden where he was in residence. His 1954 testimony was also introduced from the transcript.

Again Stubbs was convicted of first degree murder and sentenced to twenty years and one day. The Supreme Court of Tennessee reviewed and affirmed the conviction. In an opinion by the Chief Justice, the court considered and ruled upon with approval the introduction of the Holm testimony from the transcript. There was, however, a modification of the sentence. Stubbs urged that he was entitled to a credit of his pre-trial imprisonment since 1954 and with this claim the court agreed.

How and why Stubbs was released from Tennessee is not revealed but 1966 finds him in New York State pur-

suing his calling and convicted in Monroe County of first degree assault and possession of a gun. Sentences (as a first offender) could have been imposed of sixteen to seventeen years. However, because of the 1964 Tennessee conviction, Stubbs was a second felony offender and, under New York Penal Law, § 1941 (then, and to this case on remand, currently, applicable), was subject to the sentence actually imposed of thirty-two to thirty-four years. Parenthetically, although not mentioned below, I see no reason why the County Court should not be able to consider the Texas conviction as a predicate to second offender treatment on any re-sentence.

All this background material, although not irrelevant to the issue before us, has caused the majority to divert its attention to Tennessee instead of to New York. Stubbs is not seeking relief from his Tennessee conviction as such but simply from its use to support a longer sentence for his subsequent New York conviction. The attack now made on the Tennessee conviction is purely collateral. On the merits I would hold that we should respect the decision of the Tennessee Supreme Court on the subject of the admission of Holm's 1954 testimony via the transcript.

Adverting momentarily to the merits of admitting Holm's transcript testimony, the facts definitely show, in contrast to widely differing facts in cases cited, that Holm was beyond the jurisdiction of the Tennessee courts even with federal aid. See *Barber* v. *Page,* 390 U.S. 719 (1968). Therefore, I do not find it necessary to restrict the permissive categories to death and connivance. Enough flexibility should exist in the law to consider the facts of each case in relation to avaibility and importance.

All of Stubbs' present arguments about lack of confrontation are but a smoke-screen. He and his counsel confronted Holm; his counsel cross-examined Holm; the issues

and facts were not complex. More important, however, is the fact that on the 1964 trial, many eye-witnesses and ear-witnesses testified. Stubbs undoubtedly would have been convicted without the use of Holm's testimony. Of course it was important as an ingredient but so is almost all testimony placed in the category of harmless error. If harmless error be a factor on direct appeals, how much the more so should it be on collateral attacks!

In my opinion the able argument advanced by Stubbs' counsel has sought to divert us (and succeeded as to the majority) into paths of constitutional and hackneyed generalities. We all recognize the rights of confrontation and cross-examination. However, the many cases cited based on other and different facts are not dispositive here.

I would affirm the denial of the writ but at the very least would have the majority give more explicit instructions to the County Court on the possibility of regarding the Texas conviction as a predicate for the potential new sentence under § 1941 of the New York Penal Law.

Order of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of April one thousand nine hundred and seventy-one.

Present: HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. ARLIN M. ADAMS,
Circuit Judges.

UNITED STATES ex rel. WILLIAM C. STUBBS,
Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,
Respondent-Appellee.

Appeal from the United District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk.

A true copy,
A. DANIEL FUSARO,
Clerk.

Denial of Petition for Rehearing and Petition for Rehearing in banc by United States Court of Appeals for the Second Circuit is Printed in the Petition for Writ of Certiorari at pp. 1a and 2a.

Judgment on Order of Court of Appeals.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES ex rel. WILLIAM C. STUBBS,

Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison,

Respondent-Appellee.

The order of the United States Court of Appeals for the Second Circuit dated the 19th day of April, 1971, having been filed in this court on the 27th day of May, 1971,

IT IS ORDERED, ADJUDGED AND DECREED that said order is made the order of this court.

HAROLD P. BURKE
Harold P. Burke
United States District Judge

Dated: June 1, 1971.

Judgment on Order of United States District Court for the Western District of New York, Remanding Petitioner for Re-Sentence.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES ex rel. WILLIAM C. STUBBS,

v.

VINCENT R. MANCUSI, Superintendent, Attica Correctional Facility

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The United States Court of Appeals for the Second Circuit by order entered on its decision of April 19, 1971, reversed the order of this court which denied petitioner's application for a writ of habeas corpus. The petitioner had challenged the sentence under which he was held, sentencing him as a second felony offender. The Monroe County Court considered a prior conviction of murder obtained against the petitioner in Tennessee, and found him to be a second felony offender, and sentenced him to consecutive terms of imprisonment totalling 32 to 34 years.

On the mandate of the Court of Appeals for the Second Circuit, which reversed the order of this court, it is hereby

ORDERED that the petitioner William C. Stubbs, now imprisoned at Attica Correctional Facility, be remanded to the custody of the Monroe County Sheriff at Attica Correctional Facility to be promptly returned by the Monroe County Sheriff to the Monroe County Court for re-sentence of the sentence of October 7, 1966, upon his conviction of assault, first degree, and a violation of Section 1897, Subdivision 2, of the New York Penal Law.

HAROLD P. BURKE
Harold P. Burke
United States District Judge

June 16, 1971.

Testimony of Alex Holm and William Charles Stubbs*.

[Pages 174-223; 234-281; 284-288]

STATE OF TENNESSEE

v.

WILLIAM CHARLES STUBBS, Alias

} Sullivan County

ALEX HOLM: DIRECT-CROSS-REDIRECT

WILLIAM CHARLES STUBBS: DIRECT-CROSS

ALEX HOLM: REBUTTAL

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* All the testimony reprinted in this Appendix is contained in the 1964 transcript of William Charles Stubbs' trial in Sullivan County, Tennessee. Page references in parentheses are to this 1964 transcript, which is part of the record before this Court. The testimony of Alex Holm was taken at Stubbs' first trial in 1954, and read in its entirety into the 1964 transcript by a court reporter, Mrs. Elena Harris.

(174) ALEX HOLM, called as a witness by and on behalf of the State, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Smith*:

Q. You are Mr. Alex Holm? A. Yes, sir.

Q. What is your age, Mr. Holm? A. I was sixty-two past.

Q. Sixty-two past? A. Yes.

Q. Where is your home? A. Karnes City, Texas.

Q. I want you to talk out loudly and distinctly Mr. Holm, so the jurors can hear you testify. Where is your home? A. Karnes City, Texas.

Q. In the State of Texas? A. Yes.

(175) Q. What is your occupation? A. Farmer.

Q. How long have you followed that occupation?

Mrs. Harris**: Do you want me to read the objections?

The Court***: I take it, you want the objections, Gentlemen, or not?

Mr. Haynes****: We will waive them.

The Court: Well, go ahead.

Mr. McInturff: We except to that. That is immaterial.

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* At the 1954 trial of William Charles Stubbs, the Attorney General was H.C. Smith. Defense counsel were B.C. McInturff, Preston Taylor, and Kenneth Wright.

** Mrs. Harris was the court reporter who was reading Mr. Holm's testimony into the record in 1964.

*** Interruptions of Mrs. Harris' reading by the 1964 Court are included herein.

**** David S. Haynes was defense counsel in 1964; his remarks are included herein.

The Court: They may go into it.

Q. Have you been a farmer all your life? A. All my life.

Q. Are you now a widower? A. Yes, sir.

Mr. McInturff: We except to that.

Q. Do you have any children, Mr. Holm? A. Seven.

Q. Seven children?

Mr. McInturff: Just a minute. We except to that, if Your Honor please. That is immaterial. It is calculated and designed to build up prejudice in the minds of the jury.

The Court: I think that both sides may go into background to some extent, but not in great detail, but the jury is entitled to know something about each witness.

Mr. McInturff: We save exception.

By Mr. Smith:

(176) Q. Mr. Holm, you said you were a widower. How long has it been since your wife passed away? A. It was on the 11th day of June.

Q. 11th of June, 1954? A. Yes, last June.

Mr. Haynes: Now, we except here, if Your Honor please.

The Court: What is your exception?

Mr. Haynes: Excepting to this next question and answer.

The Court: What is the question? Read it to me.

Q. Where did she die, Mr. Holm—in Sullivan County, Tennessee?

Mr. Haynes: There is no preliminary showing that she died in his presence and we have no opportunity now to cross examine on that.

The Court: What was the ruling of the Court in that?

Mr. Harris: There was no objection at the time.

The Court: No objection. Well, go ahead.

Q. Where did she die, Mr. Holm, in Sullivan County, Tennessee? A. Yes.

Q. How did you and Mrs. Holm happen to be in Sullivan County, Tennessee? A. Well, we started out on this trip.

Q. When did you leave Texas? A. On the 9th.

(177) Q. June 9th? A. Yes.

Q. Where were you enroute to, Mr. Holm? A. Providence, Rhode Island.

Q. How many of you were in the car? A. Two of us.

Q. Just you and Mrs. Holm? A. Yes.

Q. Where were you born, Mr. Holm? A. Sweden.

Q. Sweden? A. Yes.

Q. Where was Mrs. Holm born? A. In Sweden too.

Q. What was her age, approximately, Mr. Holm? A. Well, she was five year older than I was.

Q. She would be approximately 67? A. Sixty-seven.

Q. How long had you and she lived in the United States?

Mr. McInturff: Just a minute. Now with great respect to everybody, we except and say that he is going too much into detail in preliminary matters. We suggest that he go into the case.

The Court: Objection overruled as to that question.

Mr. McInturff: Save exception.

Mr. Haynes: We want the Court to rule on that objection.

(178) The Court: Overruled. Go ahead.

Mr. Haynes: Save our exceptions.

Q. How long had you lived here? A. Well, I have been here 44 years.

Q. Forty-four years? A. Forty-four years.

Q. Were you and she naturalized citizens? A. Yes, sir.

Q. I believe you said you left Texas on June 9? A. Yes.

Q. How were you traveling, Mr. Holm? A. In a car.

Q. Automobile? A. Automobile, yes.

Q. What kind of a car was it? A. A Ford, two door.

Q. What model? A. '51.

Q. A 1951 two-door Ford? A. Yes.

Q. Six cylinders or eight cylinders? A. Six cylinders.

Q. What kind of license was on that car? A. Well, it was a regular Texas license.

(179) Q. You had a Texas license? A. I had a Texas license.

Q. Do you remember the license number off-hand? A. No, I don't.

Q. You don't? A. No, I don't. No, I don't.

Q. What route did you follow in making the trip through the State of Tennessee? A. We came up on Highway 11.

Q. Highway 11. Where did you spend the night on the 10th of June? A. Chattanooga.

Q. Chattanooga, Tennessee? A. Yes.

Q. Do you remember whether or not you came through Knoxville, Tennessee? A. Well, if it was on Highway 11, we came through there.

Q. Do you remember any towns you passed through, Mr. Holm, before you reached the Town of Rogersville? A. Right there, the next down here, Rutledge.

Q. You came through Rutledge? A. Isn't there a Rutledge?

Q. That is Rutledge down in Grainger County? A. We had to stop there because they had road machinery there, we had to stop there maybe twenty minutes maybe.

Q. What time were you in Rutledge in Grainger County, (180) Tennessee, if you remember? A. Well, we stayed there a long time and finally a fellow came along the side and I asked him if we had to stay and eat dinner.

Q. Did you stay there up until noon? Did you eat dinner in Rutledge? A. No, we didn't.

Q. What did you do after you left Rutledge? A. We decided—we find out our clock was too late.

Q. You mean you had been using Central Standard Time? A. Yes.

Q. You were now in the Eastern Standard Time Zone? A. Yes. So we move our clock up. The next roadside table we get we thought we eat dinner.

Q. Where was that roadside table where you and Mrs. Holm stopped to eat your dinner? A. Well, we went on up and I didn't see it until it was too late. So, she said, we will get the next one and it happened to be up there by the Cherokee Lake after you pass that bridge.

Q. You passed the bridge and then you came to a roadside table? A. On the left side of the road.

Q. As you came toward Sullivan County, you say it was on the left side of the road? (181) A. Yes.

Q. How close was it to the lake, if you remember?

Mr. McInturff: Just a minute, if Your Honor please. We want to move along with this trial. There is too much leading. There is too much details about insignificant matters. We except. This may go on another hour.

The Court: Objection overruled.

Mr. McInturff: Save exception.

Mr. Haynes: We want this Court to rule on this.

The Court: I sustain the objection. It is a leading question. Go ahead.

Q. Mr. Holm, did you stop at the roadside table? A. Yes.

Q. How long were you there? A. Well, I don't think we stopped over—I don't think it was about 15 minutes, something like that, that's all.

Q. Do you remember the lay of the land around there, Mr. Holm, as to how far off the highway it was and whether or not there was any underbrush or trees growing, and so forth? If you know, tell the jury. A. Well, it was just a nice place with big shade trees, nice shade there, right on that side of the road.

Q. What time was it that you and Mrs. Holm stopped (182) at that roadside table? A. Well, I guess I would say about 12:15 or so, something like that.

Q. About 12:15. A. Something like that, I guess. That is Eastern Standard.

Q. How many benches or seats were there at that table, if you remember? A. Just one. Just one table, that's all, and two benches, one on each side.

Q. One table and two benches? A. Yes.

Q. What happened, Mr. Holm, while you and Mrs. Holm were there eating your lunch? A. Well, we was eating and all of a sudden there was a fellow came along on the side of the road. I didn't see him until about oh, 25 or 30 yards, something like that.

Q. Where was he when you first saw him? A. On the lower side of the table. He came walking up.

Q. What is on the lower side of the table you speak of? A. Well, it is a little uphill, if that is what you mean.

Q. Where is part of Cherokee Lake with respect to where you were sitting? A. Well, it is on the lower side I am pretty sure.

Q. Which direction did this party who came up come from? A. He came from down there.

(183) Q. What did he say to you or what did he do? A. Well, first thing he said it was pretty hot to be out walking, he said, and I said right there there was pretty nice shade though. Then he said, "I see your license is from Texas. Well I am from Texas too."

Q. The man said he was from Texas too? A. Yes, and he was on the way to New York.

Q. Did he say that? A. Yes, that is what he said.

Q. How long did you talk to him? A. Well we was sitting there eating and minding our own business and we didn't talk much. He said he had been down there fishing, but he can't catch anything, he said. That's all. We didn't talk to him, I mean we was trying to eat and mind our own business. He after awhile, he got out a road map and looked at it.

Q. Who had the road map? A. He did.

Q. He had one? A. Yes.

Q. What further conversation did you have with him? A. Not hardly anything there at the table. Just when we got through eating, why he stuck his road map down in his pocket and walked off.

Q. Mr. Holm, who is the man that you saw down at that (184) roadside table? A. He is sitting back there (indicating).

Q. Point him out. A. Right there (indicating).

Q. You are pointing toward Mr. William Charles Stubbs, this defendant? A. Yes.

Q. Is he the man? A. Yes.

Q. Go ahead and tell the jury what else happened after he stuck his road map in his pocket. A. I thought he walked off. Instead of that, we had our car kind of up off the—kind of on the upper side sort of. He walked around on the upper side and came back on the back side. When I got ready to put the things in the car, he stood there behind there with the gun in his hand.

Q. What kind of gun was it, Mr. Holm? A. It was a revolver.

Q. A pistol? A. Yes.

Q. What did he do with that pistol while he was standing there with it? A. He told us to get the things in the car. He said, "This is the way I am going to catch my ride (185) to Bristol and I am going to do the driving."

Q. He said, "I am going to do the driving"? A. Yes.

Q. Is that you talking or Mr. Stubbs talking? A. No, that was Mr. Stubbs talking. That is what he said.

Q. What did you and Mrs. Holm do at that time? A. Well, we tried to talk him out of it, prolong it, but he said, "If you just don't get in the car why I will kill you both and drag you down in the lake."

Q. How far was it to the lake? A. It was just a little back below there, but we was down the other day, it is kind of dried up now.

Q. What is between this roadside table and where the lake was? A. Well, it is just a high bluff there, that's all.

Q. How high is that bluff? A. Well, I couldn't say.

Q. About how high? A. It is about—

Mr. McInturff: We except to going into all that.

Mr. Smith: All right.

Q. Mr. Holm, you said you and Mrs. Holm tried to argue him out of it. Do you remember what you said to him in your conversation? A. Well, we tried to argue him out of it and talked to him in prolonging it so maybe some- (186) body could come along and see. But he had a bundle in his hand and he held that pistol next to the bundle. He had his gun in his left hand.

Q. Which hand did he have it in? Show the jury. A. He had a bundle in his right hand under his arm like this and he had a pistol in his left hand like that.

Q. Then what happened? A. Well—

Q. How long did you stay there before you left? A. Well, it didn't take long because he told us to hurry up and get in the car.

Q. Who got in the car first, Mr. Holm? A. I got in the . . . I mean, my wife.

Q. Then where did you get in the car? A. I got in the car too.

Q. Which seat? A. I will take that back. I couldn't say which one got in first. I wouldn't say.

Q. Which seat? A. In the back seat.

Q. How did you happen to get in the back seat? A. He told us.

Q. He told you and Mrs. Holm to get in the back seat? A. Yes, we had a suitcase. We told him we couldn't get in there. He told us to get that suitcase up in the front seat, throw that suitcase up in the front seat.

Q. Did you have anything, any luggage or anything (187) else in the back seat? A. Yes, we had some boxes and oh, some stuff, clothes and stuff like that, what we used on the road.

Q. In the back seat where did Mrs. Holm sit and where did you sit? A. Well, she was sitting just about nearly in the middle of the seat, because there was a bunch of boxes and stuff on the left-hand in the back seat, and I was sitting right down in the corner there on the right-hand corner in the back seat.

Q. She was sitting in the middle of the back and you were sitting on the right side? A. Yes.

Q. Who drove the car? A. Stubbs did.

Q. What did he do? What did he do with this pistol, you say he had it out in his left hand before you got in the car. What did he do with the pistol? A. He had it in his left hand all the time.

Q. How did he drive the automobile? A. With the right hand, just with one hand.

Q. How did he hold the pistol? A. Just like this all the time.

Q. You have the pistol down just below your belt buckle? A. Yes, just in his lap.

Q. Which way was it pointing? A. Just toward us.

(188) The Court: Now, just a minute, this is going to take a good while and it is twelve o'clock right now. So, you mark the page and will come back after lunch.

Examination by Mr. Wooten*:

Q. Mrs. Harris, you now have the original record before you that you had before we adjourned for lunch? A. I do.

Q. Would you read from the point that you left off? A. Yes, sir.

Back to Reading of the Original Trial.

Q. What conversation, Mr. Holm, did the defendant Stubbs and you and Mrs. Holm engage in as you came up the road? A. Well, there wasn't much said after we found out there was pressure, there wasn't much said.

Q. Did he tell you where he was going?

Mr. Taylor: We except to leading.

A. No, he didn't say then. He did say before he said he was going to Bristol, that's all.

Q. Were you going to Bristol? A. I was going to go through there, yes. The road goes through there.

Q. Had you ever been to Kingsport, Tennessee before, Mr. Holm? A. No.

Q. Did you come through Kingsport then? (189) A. Yes, we came through there.

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* John C. Wooten was the Attorney General at the 1964 trial.

Q. As you came through Kingsport, Tennessee, what did he do with the pistol? A. Well, he had it there in his hand all the time.

Q. From the time you left the roadside table, did he ever put the pistol anywhere except hold it in his left hand? A. No, he didn't.

Q. After you left Kingsport, what, if anything, occurred, Mr. Holm, what conversation? A. Well, there wasn't very much said, just a word every now and then. My wife told him to drive careful.

Q. What did he say to her? A. Well, he said, don't worry about that, I am a stock car driver, he said.

Q. He was a stock car driver? A. Yes. I have been driving stock cars.

Q. Mr. Holm, did at any time you or Mrs. Holm tell the defendant Stubbs or did he ask you what your destination was or where you were going? A. No, sir.

Mr. McInturff: We except to leading.

Q. Did you have any funds, any money or other negotiable instruments with you on that occasion? A. Yes.

Q. What did you have? (190) A. I had oh, practically $1,400.00, something like that.

Q. $1,400.00? A. Yes, that is in traveler's checks and cash.

Q. What did you carry that in, Mr. Holm? A. Well, traveler's checks, we had that in a little suitcase.

Q. Where did you have your money? A. In the pocketbook.

Q. Who had the pocketbook, you or Mrs. Holm? A. No, I had the pocketbook.

Q. What, if anything, happened with respect to your pocketbook here in Sullivan County, Tennessee, Mr. Holm? A. Well, we had some clothes hanging up on the right-hand side, and getting those clothes out of the way, I had the pocketbook in this pocket (indicating).

Q. That is your right pocket. A. Yes. That is I had practically $200 in that, I think, and I got that out and threw it back there to my wife.

Q. How did you throw it back there? A. It was just behind this way (indicating) and she noticed it and put it down in the bottom of the car.

Q. Put it down in the bottom of the car? A. Yes.

Q. What, if anything, did the defendant, Mr. Stubbs, do when you and Mrs. Holm were making an exchange of that (191) pocketbook? A. No, he didn't say anything then, but there was the one instance, the boxes, she didn't get enough room, so he told her to keep her hands up and don't fool around with anything.

Q. What did you and Mrs. Holm do with your hands at the time? A. I had my hand up on the seat there.

Q. Why did you have them up on the seat? A. Well, he said to keep your hand on the seat.

Q. Just show the jury. A. Just like this on the back seat (indicating). We didn't have room to sit back, we had to sit up like this.

Q. Where did Mrs. Holm have her hands? A. She had them in her lap. She didn't have them on the seat; just in her lap.

Q. You say you sat forward on the back seat? A. Yes.

Q. Why did you do that? A. Well, there was not room enough for both of us, just crowded sort of, we had to sit up there.

Q. Why did you have your hands on the back of the front seat? A. That is the way I had to sit. He said keep your hands there, he said.

Q. Out of Kingsport, Mr. Holm, what direction did he drive the automobile? A. Just on the same road, on 11-W.

(192) Q. That was 11-W? A. Yes.

Q. Did anything happen between Kingsport and Blountville, that is from the time you left Kingsport and came through this town of Blountville? A. No, I don't think so.

Q. Did you come through Blountville? A. Yes, we came through here.

Q. After you passed through Blountville what happened, Mr. Holm? A. Well, he—we had a map, looking at the map, we—

Mr. Haynes: The answer to the next question—I mean the objection to the next question was sustained, Your Honor.

The Court: Yeah, go ahead.

Q. Just describe what he did, Mr. Holm. A. Well, he was driving along, but he was just looking first one place and then another and looking at his rear mirror. When we got to that place he started shooting.

Q. What place was that? A. Well, it is up there where it happened. I couldn't describe it exactly here because I am a stranger.

Q. How soon was that after Mrs. Holm said, we are getting near Bristol?

Mr. McInturff: Wait a minute, there has been no statement (193) here that she said that. The only statement is Mrs. Holm said nothing much.

Q. What conversation, if any, did anyone have about Bristol? A. Well, she said that I guess—

Mr. Haynes: We would like for Your Honor to rule on that.

The Court: Yeah. I will sustain that.

Q. When she said we are getting near Bristol, what did the defendant, Stubbs, do?

Mr. Haynes: We object to that, Your Honor, that objection was sustained on line nine.

The Court: Well, omit it.

Q. Mr. Holm, from the time you left the roadside table until you got to the town of Blountville and slightly east of this town, was any adjustment made in your rear vision mirror or did you notice anything about that? A. He did that.

Q. What did he do with it? A. He adjusted it so he could see, because he was smaller than I was. He had to adjust it.

Q. You are about a little over six feet tall, I guess? A. No, five, ten.

Q. How much do you weigh? A. Well, I used to weigh 200.

Q. You don't weigh that much now? A. No.

(194) Q. You say when you got slightly east of Blountville something happened. What did happen, Mr. Holm? A. That is where he started shooting.

Q. Which hand did he have the pistol in at that time? A. Left hand.

Q. What did he shoot at?

Mr. Haynes: Objection, Your Honor, that is sustained on line 13.

The Court: What question was sustained?

Mr. Haynes: What did he shoot at?

The Court: Go ahead. I mean go ahead and read something else.

Q. When he shot, did he say anything, Mr. Holm? A. No, he didn't say a word.

Q. Where did he hit you? A. In my face.

Q. Put your finger up to where he hit it. A. One bullet went in here and one here (indicating).

Q. You are pointing up close to the inside corner of your left eye, is that correct? A. Yes, he shot my glasses.

Q. Do you have your glasses here? A. Yes.

Q. Let us see them, Mr. Holm. Mr. Holm, I hand you a pair of glasses, the right lens is in the glass and the left lens is not.

(195) Mr. Taylor: Just a minute, Your Honor, Just a minute, Mr. Attorney General. We except to him describing all these exhibits.

The Court: Gentlemen, the physical object is that way.

Mr. Taylor: The jury can see it just as good as he can describe it.

The Court: That is for the record.

Q. Mr. Holm, as you rode up the road, were these glasses in the same shape they are in now? A. Just about.

Q. What happened to them? I mean was one lens broken out before that time? A. No, sir, they was new.

Q. Were you wearing them? A. Yes, sir, I had them and I had to wipe my face off and then I noticed they was on. I didn't know they was broke until it was all over broke.

Q. What happened to them up there, Mr. Holm? A. Well, that bullet that hit me down here, why it broke the lens and it broke this (indicating).

Q. Will you file these as an exhibit to your testimony? A. Yes. And they were filed as an exhibit.

Q. Where else were you shot? You pointed to the corner of your eye? A. It was right here, just like you . . .

(196) Mr. Haynes: We object to that, Your Honor. He can describe its effect.

The Court: Yeah, I think that is sustained. Go ahead and tell where it hit. He can say where it hit.

Q. You are pointing to your cheek, right back of the corner of your mouth? A. I think you can see it.

Q. That is about an inch back of the corner of your mouth. A. Yes. That is where he operated, took it out. It stuck up there.

Q. You are pointing about two and a half inches behind that, next to your jaw. A. That's right.

Q. How many times were you shot? A. Twice.

Q. What happened to Mrs. Holm? A. She was shot once.

Q. Where was she shot, Mr. Holm?

Mr. Haynes: Now, we object to that at this time as describing where this bullet went.

The Court: Well, let her say where it hit. Let me see it.

Mr. Harris: Well, about on the same side . . .

The Court: I will let that much of it in.

A. Well, about on the same side.

Q. That is three shots. You were shot twice and she was (197) shot once. Were there any other shots fired? A. Yes.

Q. How many? A. When he started shooting, I jumped up and grabbed the gun. Of course, I was too late. He already shot her, but there was one shot fired after that. It went up in the top of the car.

Q. Mr. Holm, I hand you a picture and ask you who that picture is of.

Mr. Haynes: If Your Honor please, we except at this time. At the previous trial, the witness went on to explain what was in the picture and the court sustained that.

The Court: Was that the picture that you had here?

Mr. Haynes: Yes, Your Honor.

The Court: Well, I sustain the objection.

Mr. Haynes: Now, we object to the line of questioning.

The Court: Well, I will have to hear the question first.

Mr. Haynes: Your Honor, it was sustained by the Court . . .

The Court: I know, but what is the question? I don't feel that way about it.

Mrs. Harris: Mr. Holm, where was your wife shot?

The Court: Well, I sustain that.

Q. Mr. Holm, where was your wife shot? A. On the left side.

Q. Use your finger and show the jury about where. (198) A. Well, it was in the neighborhood around here somewhere (indicating.)

Q. You are pointing on the left? A. Yes, on the left side.

Q. About an inch and a half or two behind your mouth? A. Somewhere up in here.

Q. What happened to her, Mr. Holm? A. Well, she died.

Q. Where did she die? A. On the roadside.

Q. Mr. Holm, you say you scuffled with him for that pistol? A. Well, I just jumped on him and jerked that pistol away from him. I didn't scuffle.

Q. You jerked the pistol away? A. I jerked the pistol away.

Q. How long did it take you to get that pistol away from him? A. It didn't take no time. When I jumped on him and jerked that pistol away there was a shot went up.

Q. Use gestures to the jury and show how you got the pistol away from him. Use your hands.

Mr. Haynes: I object at this point, in that the gestures could not be seen by this jury.

The Court: Yeah, I sustain it. Go ahead to the next question.

(199) Q. You got a blister? A. Yes, on the finger.

The Court: Wait a minute.

Mr. Wooten: Your Honor, they were objecting to gestures and of course, there is no gestures in there. Describe any words . . .

The Court: Well, the words are in the record. Read the question and answer and I will rule on it.

Mr. Haynes: Well, Your Honor . . .

The Court: I will have to hear it before I can rule on it.

Mrs. Harris: Use gestures to the jury and show how you got the pistol away from him. Use your hands.

The Court: Now, what is the answer?

Mrs. Harris reads answer to the Court.

The Court: He told what happened. He went on and told.

Mr. Haynes: This is not in response to the question, Your Honor. He was asked to use gestures and we didn't . . . we can't tell whether he did or didn't.

The Court: Well, it wouldn't affect the jury one way or the other. Go ahead and read that.

Mr. Haynes: Note our exceptions.

A. I just jumped on him from behind and just grabbed for that pistol and must have jerked it away. About that time there was a shot fired. The last shot went off or a shot went up in the ceiling of the car. I got a blister there on my finger where I grabbed around that barrel, I guess.

(200) Q. You got a blister? A. Yes, on the finger.

Q. After you got the pistol away from Mr. Stubbs, what did you do with it? A. I just started hammering away with that at his head.

Q. At his head? A. Yes.

Q. How many times did you hit him on the head with that pistol? A. Well, I couldn't say, about three or four times, I guess.

Q. Whereabouts on his head was it? A. On top of his head.

Q. Was he still in the front seat? A. Yes. He was trying to get out.

Q. At that time, Mr. Holm, do you know whether Mrs. Holm was still living or whether she was dead? A. Well, when I jumped up, I felt she slumped off kind of back of me sort of.

Q. You and she had been sitting on the back seat? A. Yes.

Q. When you jumped up to get the pistol, what happened to her body? A. She slumped off.

Q. Slumped over? A. I could feel she slumped over, but I didn't (201) have time to attend to her. I had to get him.

Q. What happened to him then, Mr. Holm? A. Well, he was trying to get out, but, of course, the combination of the lock, he tried to get that lever down, he tried that three or four times. Finally he found out it went out. Then he stepped on that brake on the car and slid out backwards.

Q. What happened to the car? A. I got hold of the steering wheel and kind of whirled it around so it didn't hit the embankment, because it was coming right nearly across the road.

Q. Where did the automobile come to rest? A. Down in the ditch. It hit that embankment just a little bit.

Q. How many feet or how far did it go after he shot you and Mrs. Holm? A. I couldn't say. I couldn't say.

Q. Very far or a short distance? A. It was not long, it was just see-sawing across the road a few times.

Q. How did the automobile come to rest, on the north side of the road or on the south side of the highway? A. It was on the right-hand side of the road.

Q. Going east? A. Going that way, yes.

(202) Q. Going that way toward Bristol? A. Yes.

Q. It was on the right-hand side of the road? A. Yes, sir.

Q. What happened to the defendant? A. Well, he just dropped out backwards, sort of, got the door open and dropped out.

Q. Going out head first or feet first, can you tell the jury about that? A. No, when he got I think he just kind of slid out like that backwards.

Q. Mr. Holm, do you remember how the defendant was dressed on that occasion? A. Yes.

Q. Tell the jury what kind of clothing he had. A. He had a pair of blue trousers on, not bluejeans, just blue trousers and a khaki shirt, rolled up sleeves.

Q. Did you notice anything peculiar about his trousers on that occasion, Mr. Holm? A. Well, they was dirty. Then he had a little torn place on the left knee.

Q. Describe that torn place. A. It was up here, sort of a little jag about half an inch or three-quarters inch, something like that.

Q. When did you first notice that? (203) A. After he got in the car. I kind of took a pretty good description of him.

Q. Could you see that place from where you were sitting in the car? A. Yes.

Q. Why were you examining his clothing?

Mr. Haynes: Objection, Your Honor, and an objection was made and sustained by the Court.

The Court: As to why he was examining his clothing?

Mr. Haynes: As to why he was examining his clothing and the answer was unresponsive.

The Court: Let me see it.

Mrs. Harris: He says, yes, I think anybody would.

The Court: Yeah, sustain the objection.

Q. You did see it, you say?

Mr, Haynes: Objection there, Your Honor. It was sustained by the Court.

The Court: Yeah, sustained.

Q. Mr. Holm, did you or Mrs. Holm either one use any weapon or threaten the defendant on that occasion? A. No, sir. No, sir.

Mr. Haynes: We object, Your Honor please here to this next question. It was leading.

The Court: Let me see. Don't answer that question. Omit it. Is that the one that you are talking about?

(204) Mr. Haynes: Yes, Your Honor.

Q. Mr. Holm, how far from Blountville was it? You have been over that road since. Could you tell about how far it was?

Mr. Haynes: Your Honor, we ask the court to rule on this.

The Court: Read the question and answer to me.

Mrs. Harris: Mr. Holm, how far from Blountville was it? They—you have been over that road since. Could you tell about how far it was?

A. Well, I don't know from Blountville. They said it was about five miles from Bristol, I think.

The Court: Well, just leave it the way it is. Sustained.

Q. Did that shooting occur in Sullivan County, Tennessee, near the town of Blountville? A. Yes, they said it was in Sullivan County.

Mr. Haynes: We object, if Your Honor please to what someone told him. And not what he was purported to know.

The Court: He didn't say somebody told him.

Mr. Haynes: He said, they said.

The Court: Oh, did he? Well, sustain the objection.

Q. Had you ever been here before? A. No, I haven't. This is the first time we had ever been up this way.

Mr. McInturff: We except, if Your Honor please.

Q. Mr. Holm, did that occur on 11-W, Highway 11-W, between the town of Blountville, Tennessee and Bristol, Tennessee?

(205) Mr. Haynes: We except to that question as leading if Your Honor please.

The Court: Yes, it is. Sustain the objection.

Q. After the shooting where did the defendant go after he slid out of the car? A. I never did see him. I never did see him after he got out of the car. I didn't see him no more.

Q. At that time was Mrs. Holm dead? A. No, she was not dead then.

Q. How long did she live after the shooting? A. After the car stopped, I kind of raised her up and called to her and she opened her eyes, which I could see that was just the end of it.

Q. How soon after that did she die? A. It didn't take but just—as soon as the car stopped, I got hold of her and raised her up.

Q. How long after that was it until any person stopped? A. There was people right there it looked like. It didn't take—I don't think it took half a minute.

Q. Almost immediately would you say? A. Yes.

Mr. Taylor*: We except to that.

The Court: Sustained.

A. I called for help.

Q. You called for help? (206) A. Yes, and they stopped.

Q. Who removed Mrs. Holm's body from the car? A. Well, I couldn't say; it was a stranger to me, but he helped me get her out.

Q. Where were you taken? A. We was both taken—I was taken to the hospital there.

Q. What hospital, up at Bristol? A. Bristol Memorial Hospital.

Q. How long did you stay there?

Mr. Haynes: We object if Your Honor please. The question was asked and the answer was given, but—

The Court: Well, I want to hear those gentlemen.

A. Eight days.

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*Mr. Taylor was defense counsel at the 1954 trial of William C. Stubbs.

The Court: Now, read the next one.

Q. Mr. Holm, at the time when you were down at Cherokee Lake, did the defendant, Stubbs over here, drive your automobile with your permission or against your permission?

Mr. Haynes: We object to that question.

The Court: I think that it is suggestive the way that it is. I sustain the objection.

Q. Mr. Holm, when did you next see Mr. Stubbs, this defendant? A. That night.

Q. Where did you see him? A. Up in the hospital room.

Q. How did he happen to come there, Mr. Holm? A. (207) Well, there was officers brought him up there.

Q. Do you remember what officers brought him? A. I think Captain Williamson was along and there was two or three more.

Q. Do you know Mr. Roy Edwards of the Bristol force? A. Well, they was all strangers to me and I was sort of, kind of doped up a little bit, but I had my head clear enough so I could see.

Q. What was Mr. Stubbs doing there at the hospital?

Mr. Haynes: Objection Your Honor, that would call for a conclusion on his part.

The Court. That is right, he wouldn't know. Sustain the objection.

Q. Do you know what time it was? A. No, I don't. I couldn't tell you.

Q. Is this defendant, William Charles Stubbs, the man that was brought at the hospital that night? A. Yes, sir.

Q. Is he the man that shot you and also shot and killed Mrs. Holm?

Mr. Haynes: Object to leading. He is just leading every question right along in there.

The Court: I sustain the objection.

Cross Examination by Mr. Taylor:

Q. Mr. Holm, sir, what time did you say you were there at the (208) table eating? A. It was oh, a little after 12 o'clock.

Q. Little after twelve? A. Yes, if I remember right, it was ten minutes to eleven when we was down at Rutledge. Then I moved my clock up, so I guess it would be a little after twelve o'clock.

Q. You first saw this boy while you were eating? A. Yes.

Q. And he left? A. Well, I thought he left, but he just went around the car.

Q. Now at that time there was nothing to have prevented him from killing you or killing your wife, if he had wanted to, was there, sir? A. Well, I don't know.

Q. You had no gun? A. I didn't have no gun, no.

Q. If he had wanted to shoot either you or your wife, there was nothing to have prevented him from shooting at you, was there, sir? A. I guess not.

(209) Q. Now he left, you say? A. No, he didn't leave. I thought he left, but he went around the car.

Q. He went where? A. He just went up the road, went around the car and came back, on the outside of the car, and I didn't notice that.

Q. He left, he went around the car, and you didn't notice? A. No, because we was eating, with our back to the car.

Q. Just answer my question, and we will get along. A. Yes.

Q. He went around, as you say, to the back of your car? A. Yes.

Q. And as you got ready to resume your trip, he pointed a pistol at you, is that right? A. Well, we had to pack in our luggage in there where we had a little ice-box.

Mr. Haynes: Your Honor, we withdraw that question on line number four.

The Court: Read the question and answer.

Q. After you packed your car, is that when he pointed the pistol?

Mr. Haynes: We don't care to ask the question.

The Court: Well, go ahead and read the rest of what is in there.

A. No, it was before. He told us to get that stuff in there and get it in there in a hurry.

(210) Q. At that time, Mr. Holm, if he had wanted to shoot at you or to shoot at your wife, there was nothing to have prevented him from doing that? A. No. He said if we make an alarm, he said he would kill us both.

Q. There was nothing to have prevented him from taking your car and leaving you there, was there? A. I guess he could.

Q. When you got into the car, I believe you told the jury you were in the back seat, is that right? A. Yes, sir.

Q. Your wife was in the back seat? A. Yes, he told us to do that.

Q. You were on the right? A. Yes.

Q. Am I right there? A. Yes, sir.

Q. Where did he tell you to put your hands or did he say anything about where to put your hands? A. Keep your hands still.

Q. Do what? A. Keep your hands still.

Q. Keep your hands still? A. Yes.

Q. Did he tell you to lay them anywhere? (211) A. I had them on the seat, keep them there.

Q. Did he order to . . . order you to do that? A. Yes.

Q. You put your hands on the seat? A. Yes, keep your hands still, keep your hands there on the seat.

Q. How much money did you have in your pocket? A. Oh, just money, we didn't have but—

Q. Your best judgment. A. About $220, $230, something like that.

Q. At no time on this trip did he make any demand for your money? A. No, he didn't.

Q. How many times did he tell you to keep your hands up on the back of the seat? A. Just one time, I think.

Q. Just once? A. Just once.

Q. When did you move your hands from the seat? When was the first time?

Mr. Haynes: Your Honor, that answer is not responsive. We withdraw that question.

The Court: Read that answer.

Q. When did you move your hands from the seat? When was the first time?

(212) Mr. Haynes: We would like to withdraw the question.

The Court: I don't know whether you can withdraw or not, it is in the record. It is part of the examination and I think that it ought to go in there.

Mr. Haynes: Well, we don't care to ask that question.

Mr. Wooten: Well, if Your Honor please, they just can't pick out things that would be beneficial to them . . .

Mr. Haynes: There is nothing beneficial about it. We would have the right to choose the questions on cross examination if he were here.

The Court: I sustain the objection. Go ahead.

Q. You moved your hands one time as you have told the jury? A. Yes, I got those clothes out of the way.

Q. You moved your hands one time to take a pocketbook

and slide it to your wife? A. That . . . Yes, I had to get —she was sitting on some clothes.

Q. That is the first time, sir, that you moved your hands? A. Yes.

Q. He didn't shoot you then, did he? A. No, he didn't. No, we told him we would get the clothes out of the way. She was sitting on the clothes.

Q. In fact, he told you and your wife both that all he wanted was a ride to Bristol, is that right, sir? A. That was when he first came in and demanded he was going to do the driving.

(213) Q. The only time you found different was when you claimed that you got shot, is that right? A. That's right.

Q. Did he ask you for any food? A. No.

Q. At no time? A. No, he didn't.

Q. Are you sure of that, Mr. Holm? A. Yes.

Q. I believe you have told the jury that when you got out of Blountville, where this alleged shooting took place, that there were no cars either going or coming that you could see? A. Just right there, yes.

Q. How far down the road, how far toward Bristol could you see up the highway? A. Oh, I don't know, just—well, quarter of a mile, that little stretch of road.

Q. I beg your pardon? A. About a quarter of a mile. I don't know just exactly, I was a stranger on the place.

Q. Could it have been more than a quarter of a mile? Could it have been a half a mile? A. I don't think it was.

Q. How far back down the road was visible? (214) A. Well, there is a little stretch of road about quarter mile long.

Q. In other words, under your testimony, it was a distance of half a mile, that is from where you had come toward where you were going, where there were no cars visible? A. I don't think it is half a mile. It is just a little straight road about quarter mile long; that's all.

Q. Both ways? A. Yes, yes.

Q. Are you sure of that? A. Well, I couldn't say. I am a stranger on the place.

Q. This boy took you, as you testified, through Rogersville. He stopped at all traffic lights? A. No, he didn't.

Q. He did not? A. No, he didn't stop. I think he stopped one time at what is that next place, Kingsport down there, I think we had to stop one time. Otherwise he kind of drove so he came through green lights.

Q. I mean he obeyed all the traffic signs? A. Yes, he did.

Q. Through Surgoinsville, or do you recall the town of Surgoinsville? A. No, I don't.

Q. Through Church Hill and also through Kingsport and through (215) Blountville? A. Yes. I know the place Kingsport.

Q. If he had wanted to shoot you, nothing would have kept him from it, would there, sir? A. Well, there was traffic there, there was cars coming and going all the time.

Mr. Taylor: I believe, Mr. Holm, you can come aside.

Your Honor, we may want to call him back for further cross-examination.

Redirect Examination by Mr. Smith:

Q. Mr. Holm, I show you a picture of a roadside park and table, and I will ask you if you have ever seen that roadside table before?

Mr. Haynes: We object to that, Your Honor, the . . .

The Court: Let him answer it.

Mr. Haynes: It about the photograph.

The Court: Photograph of the table.

Mr. Haynes: Well, we don't know what it is a photograph of he didn't identify it.

The Court: I don't know whether he did or not. Let's see what the answer is.

Mr. McInturff: We except to that unless it is shown that the conditions as portrayed in that picture existed on this (216) day of June 10 or 11.

The Court: Ask him if there is any difference.

Q. Mr. Holm, I believe you said this was June 11, 1954? A. Yes, sir.

Q. When were you back down there at this same roadside table? A. Well, they took me down just the other day.

Q. Last Friday? A. Yes.

Mr. McInturff: Just a minute. We except to this.

Q. Were the conditions approximately the same, Mr. Holm? A. Yes, sir.

Mr. McInturff: We except.

Mr. Haynes: We except to this . . .

The Court: He said the conditions were approximately the same. I will let him answer it. He didn't say that there was any difference.

Mr. Wooten: If Your Honor please, there has been ten years elapsed in this trial and there was many things available to us that are no longer available . . .

The Court: Well,

Mr. Haynes: We object to his tell what is available and what is not.

The Court: Well, it don't make any difference one way or the other. Go ahead and read.

Testimony skips over to page 114 of the original transcript.*

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* This reference is to the 1954 transcript.

Alex Holm—Redirect.

(217) ALEX HOLM, recall as a witness by and on behalf of the State, having been previously sworn, testified further as follows:

Redirect examination by Mr. Smith:

Q. Mr. Holm, you are the prosecutor and have testified this morning in this case? A. Yes, sir.

Q. Mr. Holm, when you first saw this defendant, did you notice as to whether or not he was clean shaven or what the condition of his beard was?

Mr. Haynes: An exception was made at that point.

The Court: I think it would be material, gentlemen and I am going to let it in.

Mr. Haynes: Alright, we save exceptions.

A. No, he had about three, four days' growth beard.

Mr. McInturff: Just a minute. We except on another ground. This witness testified heretofore and did not testify to that. Now they bring another witness on or two more, who testify to it, and then they put him back on to substantiate their testimony, and we say that is not proper conduct in the trial of the case.

The Court: Overruled.

Mr. McInturff: Save exception.

Q. Mr. Holm, I hand you a pair of trousers that has been introduced as an exhibit to certain other witness' testimony, (218) and ask you if you have ever seen that pair of trousers before?

Mr. Haynes: We object to that, if Your Honor please.

The Court: What is the objection?

Mr. Haynes: Well, in the transcript, they apparently handed the witness a pair of trouser . . .

The Court: You don't have the trousers, here, do you?

Mr. Wooten: I am afraid they are gone.

The Court: Well, if they don't have the trousers, they don't have them. Ask the question and answer again and I will see whether or not . . .

Q. Mr. Holm, I hand you a pair of trousers that has been introduced as an exhibit to certain other witnesses' testimony, and ask you if you have ever seen that pair of trousers before? A. Yes, sir.

Q. Where did you see them, Mr. Holm?

Mrs. Harris: That is what they objected to.

The Court: Well, read the answer.

A. On Mr. Stubbs.

Q. On Mr. Stubbs? A. Yes.

Q. This morning, Mr. Holm, you testified that while you were in the car . . .

Mr. Taylor: We except to that. The trousers speak for (219) themselves.

Q. Will you point out the slit place in the trousers—

The Court: Wait a minute. Omit that.

Q. Mr. Holm, I hand you a 32 pistol which has been introduced as an exhibit to other witnesses' testimony. Have you seen that gun before or if so, where did you see it,

Mr. Holm? A. Well, that is the one I jerked away from Mr. Stubbs. I just grabbed it just like that. I don't know, anyhow, I grabbed it.

Q. Is that the pistol you grabbed from Mr. Stubbs? A. Yes, one like it.

Mr. Taylor: We except to that as leading.

Mr. Haynes: We except to it too, Your Honor. That has been gone over before.

The Court: Alright, go ahead.

Q. Where did you leave the pistol, what happened to it? A. When he stepped on the brake and tried to get out of the car, I lost my balance, to grab the wheel on the car, to keep from getting into the ditch, I just dropped it on the floorboard in the back.

Mr. Haynes: Now, we except to the next question.

The Court: Let's see it. Well, go ahead to something else.

Q. Mr. Holm, up until the time that the defendant Stubbs got in the car at the roadside table, was there any pistol or (220) other sort of firearms in that automobile? A. No, sir.

Q. Did you examine the roof or the top part of this automobile after this occurrence, Mr. Holm? A. Well, not then, but I saw it after I got out of the hospital.

Q. And what did you see? A. I saw that dent where that bullet went up.

Q. Where was the dent? A. I saw that dent where that bullet went up right in the middle of the front seat sort of.

Q. Was that dent in there prior to the time your wife was shot, Mr. Holm? A. No, sir, it just happened then.

Q. Sir? A. It happened at that time when I grabbed that pistol.

Mrs. Harris: And then he was excused.

Mr. Haynes: Now, we have questions that we would liked to have asked this witness were he available and we would like to read them into the record at this time.

The Court: I don't understand you.

Mr. Haynes: We have further questions of cross examination that we would like to ask Mr. Holm, were he here. Well, the Court will hear them, here, but not in front of the jury. He is not here and he can't answer them.

The Court: Well, you can do it later, gentlemen.

(221) The Court: Now, do you have any other witnesses that you want to put on?

Mr. Wooten: Yes, Your Honor, we would like for her to read some more while she is on the stand.

The Court: Alright, go ahead.

Mrs. Harris: On page 195 there is some more redirect.

The Court: I wish we had another copy here. I am at a little disadvantage to you gentlemen. You are getting ahead of me.

Mrs. Harris: Alex Holm, the prosecutor, was recalled as a witness on behalf of the State, and testified further as follows; Redirect examination by Mr. Smith. Mr. Holm, when the defendant—

Mr. Taylor: At this time we want to make an exception to the redirect examination of this prosecutor. This is the third time in this trial it has taken place. The State puts on one or two witnesses; puts on the prosecutor; puts on one or two witnesses and brings the prosecutor back for redirect examination to help substantiate what has previously been testified. We except to it.

Mr. Haynes: We would like for this Court to rule on that.

The Court: Overruled. The Court ordinarily allows that where there is something that hasn't already been brought out. I sustain the objection.

Mr. Wooten: Your Honor please . . .

(222) The Court: I sustained it. There is no use in your arguing.

Mrs. Harris: Let me make this observation, if the Court please . . .

The Court: Wait, I don't want his observation. Just go down and get the evidence there.

Q. (By Mr. Smith) Mr. Holm, when the defendant Stubbs got into your car in Hawkins County, did he have any blood on the shirt he was wearing? A. No, sir.

Q. When you were in that automobile some short distance east of Blountville, when you were shot, did you bleed?

Mr. Haynes: Now, Your Honor, this was grossly leading.

The Court: Read the question, but don't read the answer.

Q. When you were in that automobile, some short distance east of Blountville, when you were shot, did you bleed?

The Court: Well, I will sustain the objection.

Q. Was it your blood . . . I mean was any blood in your car?

Mrs. Harris: Do you . . .

Mr. Haynes: We object here.

The Court: I will allow him to say whether there was any blood in the car or not. Go ahead and answer the next question.

Mrs. Harris: Well, the Court said, well, let him go ahead and answer the next question if he abandons that one.

Q. Before the defendant got in your car, Mr. Holm, was there any blood on the seat and in your car? (223) A. No sir.

Q. When you were shot and Mrs. Holm was shot, did you bleed and did she bleed? A. Yes.

Mr. Taylor: We except to that question on the ground, may it please the Court, it is leading and it is suggestive.

The Court: Suggestive.

Mrs. Harris: Were you standing up when you hit him in the head with this pistol or sitting down?

Mr. Taylor: We except to that, to repeating testimony. It is calculated to arouse prejudice . . .

The Court: I don't believe that they ever asked that question. Go ahead and read the answer.

Q. How were you in that car when you were hitting him in the head? A. I was standing up.

Q. Did you see your automobile later, Mr. Holm? Did you have any blood in the front seat later?

Mr. McInturff: We except to that.

A. Yes, I saw blood all over it.

Q. How did the blood get on the front seat? A. From my face I guess.

Q. Were you standing over the front seat? A. Yes.

* * *

(234) Mr. Haynes: I have some while the jury is out . . . I have some questions that I would like to . . . would like to have asked Mr. Holmes, had he been here as a witness, Your Honor.

The Court: Yeah, go ahead and tell . . . go ahead and read them.

Mr. Haynes: At this time, we would like the record to show the questions that the defense attorneys would have insisted on had Mr. Holmes* been here as a witness.

Q. 1. Mr. Holmes, at the time of this shooting, did you have any insurance on your wife and if so, what amount?

Mr. Wooten: If Your Honor, please, questions are objected to at this time.

Q. 2. Have you collected any life insurance on your wife as a result of this?

Q. 3. Mr. Holmes, in reply to Mr. Taylor's question, you stated that Mr. Stubbs took a road map out of his pocket I mean you saw Mr. Stubbs stick a road map down in his (235) pocket and walk off, I would like to ask you how long that time was that took place in there?

Q. 4. Mr. Holmes, you stated that you thought that Mr. Stubbs walked off. I would like to ask you if you saw him walking back and forth, down the road and back up the road and so forth. And ask you if you observed his condition at that time?

Q. 5. Mr. Holmes, you have replied to the questions that the Attorney General asked you instead of quoting, this is the way that I am going to catch my ride to Bristol and I am going to do the driving, I will ask you, could he have said, this is the only way that I am going to catch my ride to Bristol and am going to do the driving?

Q. 6. Mr. Holmes, you replied to the Attorney General that you tried to talk him out of it with reference to taking the automobile. I will ask you what you stated to him in your words at that time?

Q. 7. Mr. Holmes, you stated that you tried to argue him

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*In some portions of the transcript, the name Holm is spelled "Holmes."

out of driving you to Bristol. I will ask you exactly what you stated to him at that time and what he said in reply, if anything?

Q. 8. Mr. Holmes, you say that you can't say which one of you got in the car first, you or your wife. I will ask you if other details aren't as unclear in your mind as that detail?

Q. 9. Mr. Holmes, you answered the Attorney General's question (236) that there wasn't much said after you found out that there was pressure that there wasn't much said. I will ask you what you mean by pressure and how long that lasted?

Q. 10. Mr. Holmes, you were asked the position of your hands while riding in the automobile and you stated that you had your hand on the seat there. I would like to ask you if you had your hand on the seat as you left Blountville and whether or not both of your hands were not back on the back of the front seat as you left Blountville and rode up the road toward Bristol?

Q. 11. And I would like to ask you Mr. Holmes, if it isn't a fact that, as you rode from Blountville toward Bristol, in the back seat of the car, that if you were not in the front right hand corner of the back seat and didn't you reach over and take the pistol off of the seat and proceed to strike Mr. Stubbs on the top of the head with it?

Q. 12. Mr. Holmes, I would like to ask you if you recall as you passed through the City of Kingsport and as you stopped for a red light there, do you not recall a police officer standing near by?

Mr. Haynes: Now, I am sure that there would be other questions, if we had the replies to these.

Mr. Wooten: If Your Honor please, the State enters an objection to all questions asked.

* * *

(237) The next witness, WILLIAM CHARLES STUBBS, after being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Haynes:

Q. Would you state your name? (238) A. William Charles Stubbs.

Q. Are you called, William, Bill, or Charles? A. Bill.

Q. What is your age, Bill? A. 32.

Q. Ten years ago, of course, you were 22 years of age? A. Yes, sir.

Q. Now, I direct your attenion to June 1954, had you started to—

Mr. Wooten: Now, that is leading.

The Court: Yes, it is a little leading. Go ahead.

Q. Now, at that time, had you been discharged from jail in Texas? A. Texas State Prison.

Q. Had you served all of your time, and did you have a clean slate at that time? A. Yes, sir.

Q. Did you get time off for good behaviour? A. Yes, sir.

Q. Where are your folks from and where are they still living? A. Rochester, New York.

Q. And you are not married? A. No, sir.

Q. Is your father alive? A. No, sir.

(239) Q. Is your mother alive? A. Yes, sir.

Q. Is she still living in Rochester? A. Yes, sir.

Q. What other immediate family do you have living there in Rochester? A. I have a sister—

Mr. Wooten: If Your Honor please, I see no materiality in it—

The Court: Well, I will allow what is in now, but go ahead from there.

Q. Do you have other brothers and sisters? A. Yes, sir, I have an older brother and two younger brothers.

Q. Is one of your younger brothers, Don, who is here? A. Yes, sir.

Q. Do you have oth r members of your family—

Mr. Wooten: Your Honor, I—

The Court: Yes, I think that covers it. Go ahead to something else. Alright, I will sustain that objection.

Q. When you left Texas in 1954, how were you traveling? A. I was hitchhiking.

Q. Did you generally know the route you were going to take? A. No, sir.

(240) Q. Alright, did you study any maps to ascertain how you were going to travel? A. Eventually.

Q. What was your financial condition when you left Texas? A. I was broke.

Mr. Chastain: We object to that, Your Honor.

The Court: Well, I will let it in.

Q. What was your reply? A. I was broke.

Q. How did you ascertain that you were going to travel by Routes, what route did you determine to take? Generally, I don't mean specific towns? A. Louisana, Alabama, Mississippi, North Carolina. And Tennessee.

Q. And did you have any possession of a gun as you started off? A. Yes, sir.

Q. And as far as you know, is this the same gun? A. As far as I can tell.

Q. Did you know anything about the countryside or the condition of the country that you were going to be traveling through? A. None other, than swamps and things like that.

Q. What was the purpose of your carrying a gun on you?

(241) Mr. Wooten: Now, here is a convicted fellow carrying a gun. . . .

Mr. Haynes: Now, if Your Honor please, we except to the Attorney General's remark and we move for a mistrial. There is no evidence in the record to sustain that remark and it is highly prejudicial.

The Court: Overruled. And I sustain the objection as to the gun.

Q. As you hitchhiked and traveled, do you remember when you came into the State of Tennessee? A. I believe that it was on the 10th of June.

Q. And do you remember where you came in Tennessee? A. I believe that it was a little town below Johnson City.

Q. Do you know how many rides you caught, one long ride or a number of short rides or what? A. Well, the longest ride that I caught was from Jackson, Mississippi to a little town above Murphy, North Carolina.

Q. As you came ino Tennessee, what was your condition of health and how long had it been before you had eaten—

Mr. Wooten: Now, Your Honor please, that is—

The Court. There is quite a bit involved. Go ahead. I will let you ask a question, but don't just put several of them together.

Q. How did you eat along your trip? (242) A. When the people gave me a ride, some of them gave me coca cola and a cup of coffee now and then.

Q. Had you had any square meals at all since you left Texas—

Mr. Wooten: Your Honor please, he is leading the witness something terrible.

The Court: Just ask him how much he had eaten and let him tell. Don't suggest it. Now, go ahead and answer it.

Q. How much had you eaten since you left Texas, if you recall? A. Three meals and about four coca colas and some coffee in six days.

Q. Six days? A. And six nights.

Q. When you left down below Johnson City somewhere, did you remember who you caught a ride with or where they took you? A. I caught a ride with two police officers and they took me to an all night gas station and informed me which would be my best route.

Q. And as a result of your conversation with them, where were you trying to get? A. To Bristol, Tennessee.

Q. Did you run into another—

(243) Mr. Wooten: If Your Honor please, that is another leading question.

The Court: Well, let's get along. Don't ask leading questions.

Q. What did you learn about the junction of routes at Bristol? A. I understand that there is a truck route from Bristol, Tennessee going through Pennsylvania and New York State and I would be able to catch a ride.

Q. Now, did you catch a ride trying to get up to Bristol? A. I caught a ride with some young fellows and they let me out in Johnson City at the bus station.

Q. And where did you go from there? A. I slept in the bus station from early morning until after daylight until I was run out.

Q. Where did you go then? A. I went up and crossed a set of railroad tracks and there was a garage that had shrubbery around it and I went behind the garage and went to sleep.

Q. Now, did you eventually catch a ride that took you somewhere other than Bristol? A. Yes, sir, it was late that night.

Q. Just tell his Honor and the jurors about anything—

The Court: Let's get on down to this. I don't want to delay you, but let's get on down to this time. (244)

A. I caught a ride with a fellow and I was tired and I asked him if he was going through Bristol and he said that he was and he informed me when he got to Bristol that he would let me out and I went to sleep in his car and I woke up some time later. Sometime late that night and I asked him if we had come to Bristol yet and he stated that he had been thinking about something and forgot me. There was lights up ahead and I had him let me out where the lights were. It turned out to be the Cherokee Motel on route 11-W heading toward Knoxville.

Q. Now, did you spend the rest of that night down in that vicinity? A. Yes, sir.

Q. The next day, do you remember the date of the next day? A. The next morning, June 11th.

Q. And where did you go then? A. I caught a ride—

The Court: Let's get down to the time, gentlemen to the question involved. You are taking up too much time in all of the preliminaries.

Mr. Haynes: Well, Your Honor, we don't anticipate but have these two witnesses—

The Court: Well, I want to get along. I have heard (245) all of these things that he has done. Now, let's get down to it.

A. I caught a ride down to a truck stop near Cherokee Lake Bridge and the fellow turned around and went back and I went in there that was supposed to have been a truck stop. That particular station, they said that there wouldn't be no trucks along until late that night.

Mr. Wooten: If Your Honor please, that is the conversation with someone else.

The Court: Sustain the objection. Now, he can . . . let's get along, gentlemen.

Q. Now, did you catch a ride on up toward Cherokee Lake? Well, this wasn't but a half mile I believe distance from the bridge. From the lake itself.

Q. Now, at this point, what was your physical condition then? A. I needed a shave and I was hungry and I couldn't hardly walk.

Q. Were you having any luck getting a ride? A. No, sir.

Q. Was there traffic or not passing? A. There was a little traffic, but they was going on by.

Q. Did you come onto Mr. and Mrs. Holmes there on the road that day? A. That was later that day.

(246) Q. About when was it? A. I guess it was about noon. I don't know.

Q. And under what circumstances did you come onto them? A. I had been down to the lake soaking my feet and I heard them when they pulled up there at that roadside table and I come up on the road and asked them for a ride. And I saw that they was eating and they had their backs toward the road. So, not to come from behind, I went around and come up in back.

Q. Why had you been down there soaking your feet?

Mr. Wooten: Your Honor, that is not material.

The Court: Let him go ahead and let's get along.

A. My feet had been blistered and the blisters had broke and they was bleeding and I couldn't hardly walk on them.

Q. Alright, now, was there any conversation between you and Mr. or Mrs. Holmes there? A. Mr. Holmes and Mrs. Holmes was eating and I come in front of them and I waited until Mr. Holmes looked up and I said something about good morning or something like that and I asked

them for a ride as far as Bristol. And he said, "Nope, I haven't got any room".

Q. And then what did you do? A. I stood there about three minutes and they didn't pay me no attention and so I walked out in the road.

(247) Q. And then what happened? A. A couple of cars come by and didn't stop and one car pulled up there a little ways and by the time that I got up to it—about the time that I got up to it, he pulled away and said something about getting a horse.

Q. And what did you do then? A. And so I walked back and forth and as I passed where they were, I was hoping that they would notice me and offer me a ride.

Q. And then what took place? A. I watched them until they got done eating and I watched them start putting their stuff in the car and I remembered the gun I had in my belt and I thought that there wouldn't be much wrong with getting a ride if I didn't bother them or take anything that they had or nothing.

Q. What did you do? A. And so I watched them two or three trips from the roadside table putting things in their car. I stood near the back of their car with the gun in my hand down at my side waiting for them to notice me.

Q. Then what did you do? A. When Mr. Holmes noticed me, he said, "He has a gun" and I said, yes, finish putting things in the car and (248) get in.

Q. Did you say anything to him about getting to Bristol at that time? A. No, sir, not at that time.

Q. When did you? A. After I started driving.

Q. What did you say? A. I told him after I got started down the road, Mr. Holmes was a little nervous, and I told him, I said, as long as you don't try to jump me and get this gun, I says, you won't have no trouble, that I want to ride as far as Bristol, Tennessee.

Q. Did you attempt to take anything they had? A. No, sir.

Q. Did you intend to hurt them in any way? A. No, sir.

Q. What did you intend? A. Just to ride as far as Bristol.

Q. How did Mr. Holmes sit in the automobile and where was he seated? A. Mr. Holmes or Mrs. Holmes?

Q. Mr. Holmes? A. Mr. Holmes was sitting in the back seat in the right hand corner.

Q. And where was Mrs. Holmes located? (249) A. Mrs. Holmes was in back of me. In the left hand corner.

Q. Was there anything else in or about the back seat? A. There was some clothes and luggage and stuff.

Q. Was there any conversation about where Mr. Holmes had his hands, did you direct him to put his hands anywhere?

Mr. Wooten: Your Honor please, that is grossly leading.

The Court: Well, if there was any conversation about his hands, answer that.

A. I seen him make some moves and I told him to be still one time.

Q. Now, was there any conversation that—do you know what the first town was that you all came through? A. The first large town was Rogersville, I think, I don't know.

Q. Now, between the picnic table and Rogersville, were there any further conversations? A. Yes, there was.

Q. What was that? A. After I told him that as long as they didn't try to jump and get the gun, there wouldn't be no trouble, I explained to them that I was sorry that I had to get a ride this way, but that it was the only way possible at the time. I told them where I was from and where I had come down from and the condition that I was in.

(250) Q. And what reply did Mr. Holmes make to this? A. Mr. Holmes didn't say nothing to that. Mrs. Holmes

said that if I would have told them back at that roadside table, they would have been glad to give me a ride.

Q. Alright, what, if anything, did you do with the pistol? A. As we approached the outskirts of Rogersville, Mrs. Holmes assured me that they would not cause me no trouble and suggested that I put the gun out of sight while going through town. Because someone might see it and might cause trouble.

Mr. Wooten: If Your Honor please, the conversation that he is now detailing is now dead.

The Court: Well, it is part of the res gestae. I will have to let it in. It is part of it.

A. I laid the gun down on the seat beside me.

Q. How long did that gun stay there in the seat beside you as far as you know? A. As far as I know, the gun stayed there—that is the last that I seen of the gun until I came into court.

Q. Alright, now, did you all go through Rogersville? A. Yes, sir.

Q. Now, did you stay on the main route of 11-W? A. Yes, sir.

(251) Q. Do you remember after you passed through Rogersville, do you remember there being any kind of a traffic control in Rogersville, signals or lights, do you remember anything about that? A. I believe that there was a green light in Rogersville.

Q. And you passed on through? A. Yes, sir.

Q. Now, do you remember what the next town of any size was? A. Yes, I believe that it was Kingsport.

Q. Do you remember there being any traffic control signs in Kingsport, if so, what do you remember about them? A. I don't remember seeing a light, but I know that we had to stop in traffic and we pulled to a dead stop in traffic.

Q. What do you remember about the traffic—about the surroundings there as you pulled to a dead stop? A. Well, as I say, I couldn't see the light, but there was an officer that was standing right outside in the road in the traffic, directing traffic.

Q. Was he a uniformed officer? A. Yes, sir.

Q. Was there any conversation between you and or Mr. or Mrs. Holmes at that time? A. No, sir, all conversation stopped.

(252) Q. Where did you go from there? A. I went through Blountville.

Q. Was the gun still on the front seat? A. Yes, sir.

The Court: Ask him where the gun is. Don't tell him where it was. Be careful and don't lead him.

Q. Do you remember Blountville? A. Yes, sir.

Q. Do you remember coming through Blountville? A. Yes, sir.

Q. What do you remember after you passed through Blountville and headed on up toward Bristol? A. I remember seeing a sign that said six miles to Bristol.

Q. As you came to that portion of the road outside of Blountville, towards Bristol, did you remember there being any . . . what do you remember about this? A. Well, I was a little bit relaxed and . . . well, I figured that if they was going to cause me any trouble, they would have done so back at Kingsport and repeatedly, both of them assured me that there wouldn't be no trouble.

Q. Were the relations friendly then, between you and they . . .

The Court: Just say what the relations was.

Q. What were the relations between you and Mr. and Mrs. (253) Holmes after you put that gun down there on

the seat? A. As far as I know and the understanding was, when I reached Bristol, I would get out and they would continue on their way.

Q. Was there any conversation about that? A. Yes, there was.

Q. What was that? A. They said that they didn't want to cause me no trouble and when I got out, Mr. Holmes would take over and they could continue on their way.

Q. And did you agree to that? A. Yes, sir.

Q. Is that what you were going to do? A. Yes, sir.

Q. Alright, now, as you drove on up toward Bristol from Blountville, what do you recall about that? A. Well, I was relaxed and I figured everything was alright and just a few more miles and I would get out and we come down by the old Draper Corporation as I understand it.

Q. What else do you remember? A. It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in clear focus, but in a reddish haze. I mean there was no pain or nothing.

(254) Q. Then what happened? A. I felt a sharp pain that seem to start in my head and go all the way down through me and I reached up with both hands and I heard this loud roar, bang.

Q. Was the car moving then? A. Yes, sir, as far as I know.

Q. Then, what was done? A. After this loud bang—

Q. Did you hear any noise? A. No, sir, not then.

Q. Where that—where did that seem to be in relation to your head, the noise? A. It seemed to be all over it.

Q. Alright, then, what did you do after that? A. Stuff started running down my face and down my shirt and all that I could think of that he has got the gun.

Q. What did you do? A. I just went outside through the car door.

Q. How did you get the car door open, do you remember? A. No, I don't even remember that.

Q. Was the car moving or not when you rolled out? A. Yes, sir.

Q. Were you then on the highway? A. Yes, sir.

Q. Do you remember what your condition was on the high- (255) way? A. No, sir.

Q. What did you do then? A. I got up and started running to get away from that area.

Q. And why were you running at that time? A. He still had the gun.

Q. Where did you go, do you recall? A. I remember going over a fence and I run up into a little field and through a little patch of woods and as I started down through two plowed fields, everything went black.

Q. Were you passed out? A. Yes, sir.

Q. What was the condition as to lighting as you came to? A. You could see a short distance. The sun had gone down, I would say like dust.

Q. What did you do then? A. Well, I saw this little road and it seemed to go in a turn up toward the highway and I moved back to that little patch of woods and the shrubbery and I went down that road and started walking up the highway.

Q. Where were you destined to go as you were walking up that little road? A. To get to Bristol and hit the trucks running to New (256) York State.

Q. Did you have any bruise on your head at that time? A. Yes, I did, there was three wounds down here that I could stick that much of my finger down in it. (Indicating.)

Q. Had they been bleeding or not? A. Yes, sir.

Q. Did that blood get on any of your clothing? A. It was all over the front of my shirt.

Q. As you walked up that little gravel road, toward

Mr. Wooten: Now, Your Honor please, I object to his leading—

The Court: Let him state his question.

Q. As you walked along that gravel road, toward U. S. 11-W, did or not, Mr. Bernie Webb come along in his automobile—

The Court: Just ask him who came along. You are leading him.

A. He might have been, but there were several cars that passed me.

Q. Alright, sir, did one finally give you a ride? A. Yes, sir, he come back in the opposite direction.

Q. And what was the purpose of you getting in that automobile? (257) A. He asked me if I wanted a lift and asked me where I was going and I told him that I was going to Bristol and I got in.

Q. When you say Mr. Webb testify here the other day, that was the man I assume? A. Yes, sir.

Q. And where did you all go then? A. We rode a little ways until we stopped at a road block.

Q. Now, when you got in the car with Mr. Webb and rode along there, did you have any idea that Mr. Holmes was injured or that Mrs. Holmes was dead? A. No, I did not. As far as I know, none had been hurt by me.

Q. As you approached the roadblock, about what distance, in your best judgment, about what distance was it up ahead? A. Well, there was lights, I mean I couldn't rightly say, but it wasn't too far.

Q. Was there any conversation between you and Mr. Webb as to what that might be? A. Yes, I believe there was.

Mr. Wooten: I object to that—

The Court: Go ahead and ask another question.

Q. As you approached the roadblock, did you or not stop? A. We stopped.

(258) Q. And what took place there as best as you can recall? A. We sat there until the officer got there to the car and he looked in and Mr. Webbs says, I think this man ought to be investigated. He said, I just picked him up.

Q. And what was done then? A. The car door was opened and I was ordered out and I was told to put out my hands while hand cuffs were being put on and I asked the officer what this was all about and he told me to be still that I would find out soon enough.

Q. Do you know where you were taken? A. I was taken to the Bristol Jail.

Q. And what was done there? A. I was shook down and my billfold was searched and they found that I was released from the Texas Prison.

Q. Then, what did they do there? A. I was then escorted to the hospital.

Q. The same day? A. Yes, sir.

Mr. Wooten: Now, that is leading.

A. Yes, sir, about a half hour later.

The Court: Ask him when it was.

Q. When was it you were taken to the hospital? A. It was within an hour after I was arrested. (259) It was still dark.

Q. Where were you taken up there? A. I was taken to the hospital and had my head sewed up.

Q. Do you know who the doctor was that attended you? A. I guess it was that one that said that he did.

Q. You hadn't known him before, of course? A. No, sir.

Q. Did you still have the same clothes on at that time? A. Yes, I did.

Q. Where were you taken then? A. I was took down in front of Mr. Holmes' room and I stood outside with some officers while some more went in and then I was told to enter.

Q. And at the time that you saw Mr. Holmes there, what did you think his condition was?

Mr. Chastain: Object to what he thought.

The Court: Well, it might be material. I will let him answer it.

Q. Before you saw him in there . . . A. Well, at that time, I didn't know that it was Mr. Holmes.

Q. Were you taken in where you could look at him in the bed? A. Yes, as you go in, there was a bed on the left and there was a person there with the sheet drawn up and (260) bandaged, I think.

Q. Were you able to recognize who it was? A. No, I didn't know who it was.

Q. Did you so state to the officers? A. They didn't ask me. They said something to the man and the man pointed his finger at me and said that is the one.

Q. Then, where were you taken? A. I was took back to the Bristol Jail.

Q. What was done there? A. My clothes, my shoes, my socks, and my shirt and pants were took off me. I was finger printed and melted wax poured over my hands.

Q. Do you know what the purpose of that was for? A. I understand it to be a parafine test. I had a nick here in my hand and I was told that it was just routine.

Q. And then were you . . . where were you taken? A. I was took back to a cell and given a big pair of overalls.

Q. At that time, did you know that Mrs. Holmes was either dead or alive? A. No, sir.

Q. Did you try to find out what the charges were against you or not? (261) A. Yes, sir, I did.

Q. Were you able to find out? A. No, sir, I wasn't. Visitors had come to jail to see me and they was told—

The Court: Now, don't tell that.

Q. Bill, where have you been for the last ten years? A. In Nashville State Penitentiary.

Mr. Haynes: You may cross examine.

Cross Examination by Mr. Wooten:

Q. Mr. Stubbs, when were you released from the Texas State Penitentiary? A. June 4, 1954.

Q. You left Texas at that time and didn't have any food? A. Well, I left that night.

Q. You left that night? A. Yes, sir.

Q. You were turned out of the penitentiary and didn't have any money or anything of that nature? A. When I was released, I was given an off color suit of kaki suits . . . kaki clothes and a pair of prison mate shoes and a check for $50.00.

Q. Fifty dollars. Alright. Is that where you used the money to buy the gun? (262) A. No, sir, I did not buy the gun.

Q. Where did you get the gun? A. I got that gun later that afternoon.

Q. And where did you get the gun at? A. In Houston, Texas.

Q. Where is the Texas State Penitentiary? A. Huntsville, Texas.

Q. How far is that from Houston? I am not familiar with it. A. Well, I am not neither, but I guess it is about 60 or 70 miles.

Q. Did you buy the gun there? A. I did not buy the gun.

Q. Did you steal the gun? A. No, I did not, sir.

Q. How did you obtain possession of it? A. When I was released with another fellow. And we was met just outside the entrance with a fellow that had a clothing store

and we went down there outfitted ourselves in presentable clothes.

Q. Did you buy a suit of clothes there? A. No, I used that check for $50.00 and I gave him those old clothes for a pair of shoes that was presentable to walk in and a pair of pants and a shirt.

(263) Q. And that cost you how much? A. I had about three or four dollars left.

Q. You bought a khaki shirt? A. Yes, sir.

Q. And a— A. No, I didn't buy that Khaki shirt then.

Q. Well, you bought a shirt and a pair of pants? A. Yes, sir.

Q. And a pair of shoes— A. And some under clothes.

Q. And that came to $47.00? A. And some socks and some shoes, yes, sir.

Q. It cost you $47.00? A. Close to it. I know when I got on the bus at Houston, Texas, I had about three dollars left in my pocket.

Q. And where did you start hitchhiking, Mr. Stubbs? A. Outside of Houston, Texas.

Q. Just outside of Houston, Texas? A. Yes, sir.

Q. You had a road map at that time? A. No, sir, I did not.

Q. Well, when did you determine that you were going to have to go through Georgia, Alabama, and Mississippi, and Louisiana— A. I didn't anticipate going through all of that.

(264) Q. Well, where did you formulate that route? A. Well, the tentative plan was to go on to Louisana and I would try to catch the harvesting crews that were working in that area at that time. And I knew some people over there when I was there before in '52. And I hitchiked over into Marigold, Louisiana and the people had moved and so I started back toward Texas for Beaumont, that would have been, I understand, the easiest route to reach New York State.

Q. To go back to— A. To Beaumont, Texas.

Q. To Beaumont, Texas? A. It is a distance of about 40 some miles, I understand.

Q. Beaumont, Texas is West from there? A. I don't know, which direction it is in.

Q. Now, were you in the State Penitentary for? A. Breaking into a cafe in Vanhorn, Texas.

Q. Is that the first—

Mr. Haynes: Your Honor, we except to that.

The Court: Yeah, you can't go into that.

Q. Now, I don't believe that you have told us exactly how you got this gun yet?

Mr. Haynes: We except to the question as being repetitious.

The Court: I don't believe that he ever told how he (265) got the gun, let him answer it.

A. This fellow that I was with, we intended to work a week as a harvester together and the reason that we went to Houston, he said that he knew some friends where we could pick up enough cash to tide up us over until we could find a job.

Q. And that was the purpose of getting a gun until you had worked a week? A. I did not know at that time that he was going to get the gun. I was in the hotel room when he brought the gun up. He said that he got it from a buddy of his.

Q. And gave it to you? A. No, sir, not then.

Q. Well, when did he give it to you? A. We caught a taxi cab out of Houston, Texas at around midnight using the last of our money and we started walking and it was early morning at daylight when we was stopped by the highway patrol and asked where we was going and where we had come from.

Q. Who was carrying the gun at that time? A. He was.

Q. And after they left, he started to throw the gun away. Because he was in there for armed robbery anyway and didn't want to get caught with it.

Q. And when he throwed it away, then you picked it up?

(266) A. Yes, I did. I knew that Louisiana that some of the areas down through there—

Q. I didn't ask you what you— A. Well.

Mr. Haynes: Now, we except to that remark, if Your Honor please.

The Court: Go ahead and you needn't remark about anything Mr. Attorney General. Sustain the objection.

Q. Now, you say that you spend the night in Murphy, North Carolina? A. No, I did not state that.

Q. Well, you have had a copy of this record before, haven't you? A. I have looked at it.

Q. You have read it, have you not? A. Yes, sir.

Q. Well, where did you spend the night of June 10th? A. At Cherokee Lake Motel on the lawn.

Q. You have read it, have you not? A. Yes, sir.

Q. I thought that you told here this morning that you stayed in Johnson City—

Mr. Haynes: We except to the Attorney General—

The Court: Wait a minute. He asked him a question. He can say whether he did or didn't.

Mr. Haynes: The form of the question, I thought that you did such and such. Now, he can say he did or did (267) not.

Q. Well, I will ask if you didn't state a little while ago that if you didn't state in response to Mr. Hayne's ques-

tion, that you stayed over at Johnson City bus station behind the garage there— A. That was the morning of June 10th.

Q. That was the morning of June 10th? A. The morning of June 10th.

Q. Alright, now, when did you leave Murphy, North Carolina? A. I am not sure. I think it was around ten o'clock in the evening of June 8th.

Q. Of the 8th? A. I am not sure, because the routes were long. Some were long and some were short and I could sleep when I could. I am not sure of the dates.

Q. I have before me a road map and it shows Murphy, North Carolina and it—

Mr. Haynes: We except to that—

The Court: I will rule on it when he asks the question.

Mr. Haynes: Well.

The Court: Don't answer it until I rule on it.

Q. It shows Murphy, North Carolina to be about seven miles from the Georgia Line where it joins Tennessee. Am I correct in assuming that? A. I don't know, sir

(268) Q. You were there? A. Yes, I was there.

Mr. Haynes: I am going to except to this line of argument.

The Court: Now, let him cross examine. Go ahead with it.

Q. You say that you left there about 10 o'clock on June 8th? A. I presume that it was the 8th, sir. As best that I can recall.

Q. Do you remember at the previous trial, did you tell Corporal Pendergrass that you left Murphy, North Carolina early on the morning of June 10th—

Mr. Haynes: Now, we except to this. What has Murphy North Carolina got to do with this?

The Court: Well, let him answer the question. Let's get on with it.

Mr. Haynes. We except to the form of the question, did you tell Corporal Pendergrass at the former trial.

The Court: I don't think that he told him at the trial, it was afterwards.

A. I don't recall that.

Q. Now, you do recall being in Johnson City? A. Yes, for a short time.

Q. On the evening of the 9th of June? A. Early in the evening, I caught a ride out of Johnson (269) City.

Q. With someone going to Bristol? A. No, going by Bristol. He said that he was passing through it.

Q. Now, where did you sleep the next night after you left Johnson City? A. Well, the rest of that night until the early morning of June 11th, I was . . . I put myself on the lawn beside the road of the Cherokee Lake Motel. Big Chief Motel.

Q. Now, the Big Chief Motel is down in Granger County, Tennesse, is it not? A. I don't know myself.

Q. About six or seven miles north west of The Rogersville Motel . . . I mean about six or seven miles north west of Rogersville, Tennessee? A. I guess so, I don't know.

Q. Now, how did you get from there to the truck stop? The one that you were talking about? A. On the morning of June 11th, a fellow give me a ride.

Q. All the way up to the truck stop? A. Yes, sir.

Q. And about what time did you encounter the Holmes on Cherokee Lake? A. I guess that it was about noon. Because they was eating and I assume that it was noon.

(270) Q. Had you slept the night before down on Cherokee Lake? A. No, sir.

Q. Do you remember telling someone that you shot a turtle down there underneath the bridge with one shot out of the pistol? A. I don't recall that.

Q. You don't deny that you did it? A. I don't recall it.

Q. Did you do it?

Mr. Haynes: Your Honor I except to it.

The Court: Yeah, he has been on it long enough. Let's go to something else.

Mr. Wooten: I asked him if he did it.

The Court: He said that he didn't recall, if he did. The way that I understood him.

Mr. Wooten: He said that he denied saying it. I don't believe that he—

The Court: Well, go ahead. Ask the next question and let's get along.

Q. Did you shoot one? A. I shot at one.

Q. You shot at one? Underneath the bushes? A. Yes, sir.

Q. That left you five shells then in your gun. A. Yes, sir.

(271) Now, when you came up on the Holmes eating there, you did pull the gun on them and you abducted them and you did pull the gun on them? A. Not right then.

Q. Well, you did point the gun at them and put them in the car, did you not?! A. When I told them to get in the car.

Q. Pointed the gun at them and forced them into the car? A. Yes, sir.

Q. And you started to drive the car? A. Yes, sir.

Q. You told them that you were a stock car driver? A. Yes, I did tell them that.

Q. And you had your gun in your belt? A. No, sir—

Q. Did you stick it back in your belt or did you have it in your hand? A. I had the gun in my hand until I laid it down on the seat.

Q. That is the same gun that you had in your belt when you caught the ride with the officers in Murphy, North Carolina? A. Yes, sir.

Q. That is the same gun that you had when the officers captured you? A. Yes, sir.

(272) Q. Do you remember laying the suitcase up in the front seat, Mr. Stubbs? To make room in the back? A. No, sir. It was moved around in the back seat. I don't recall, but there was no front—no suitcase in the front seat, sir.

Q. Alright, how long were you in the car before you laid the gun down? A. Until we got to the outskirts of Rogersville when it was suggested.

Q. Who suggested it? A. Mrs. Holmes did. She suggested that I put it outside. Out of sight.

Q. Put it out of sight? A. Yes, sir.

Q. Now, from where Mrs. Holmes was sitting in the back directly behind you, could she see the gun, were you holding it on her in her face at that time? A. No, I had it right here (indicating).

Q. Up in your left hand, I believe? A. Yes, sir.

Q. You held the gun up like this on her? (indicating). A. Yes, sir.

Q. From the bridge in Rogersville—from the Bridge on Cherokee Lake, to Rogersville, you held the gun up in her face like this? (indicating) (273) A. Not all of the time, sir. Sometimes, I had it resting on my arm on the wheel.

Q. At that time, did Mrs. Holmes suggest to you that you lay the gun down in the seat? A. She suggested that I put it out of sight. She assured me that they would not cause me any trouble and if somebody was to see it, there might be trouble.

Q. What did you do with it then? A. I laid it down on the seat.

Q. At that time, where was Mr. Holmes? A. Sitting in the back seat.

Q. Did he have his hands on the back of the seat and did Mrs. Holmes have her hands on the back of the seat? A. I couldn't see Mrs. Holmes.

Q. You couldn't see Mrs. Holmes. Did you adjust the mirror on the back of the car? A. I do not remember, sir.

Q. About how far from your hand, did you lay the gun? A. About six inches. Six or seven inches. Not very far.

Q. Mr. Stubbs, you are left handed? A. Yes, I am.

Q. You were driving the car with your left hand? A. Yes, I was.

Q. And you took the gun and laid it over there in the seat and you— (274) A. No, I didn't, I laid it right down here (indicating). I changed my right hand and laid it down in the seat beside me.

Q. You changed it into your right hand? A. Yes, sir.

Q. And the gun remained there in the seat as far as you know? A. As far as I know, sir.

Q. Could you see Mr. Holmes as you were driving along? A. I could—when I turned my head, I could see him.

Q. And he had laid his hands on the back of that seat as you had instructed him? A. He had his hands up there once or twice and moved them and I told him to keep them still and he was back and forth.

Q. Is that why you told him to keep them still? A. Why I told him?

Q. Yes. A. I don't recall. He had moved around two or three times.

Q. Well, was that before you laid the gun down or afterwards? A. That was after.

Q. After? A. Yes, sir.

Q. He was told to keep his hands still and he did? (275) A. He did for a little while. He sure was figgity.

Q. You had the gun in your hands though? A. No, sir.

Q. You say that as you were coming up all the way through Kingsport, and all the way up through Blountville, that friendly relations were being maintained by Mr.

Holmes? A. They had talked to me and told me where they was going. Most of the time he was talking to his wife.

Q. You knew at that time where they were going? A. Yes, Mrs. Holmes had told me where they were going.

Q. Now, did you study your road map very carefully, Mr. Stubbs? A. No, sir, I haven't.

Q. As you passed up in front of the Draper Corporation, what did you say happened? A. I glanced out the window at that crowd of people in front of the Draper Corporation.

Q. And the next thing that you knew was what? A. Some one hit me on the head.

Q. Where was the gun then, Mr. Stubbs? A. The last that I see it, it was on the seat beside of me.

Q. Did you shoot Mrs. Holmes? A. No, sir, I did not.

Q. Do you remember before being asked this question, Mr. (276) Stubbs—

Mr. Haynes: Your Honor please, he has no basis for reading out of some transcript and asking if he remembers.

The Court: Yeah, that is right. Go ahead to something else.

Q. Was Mrs. Holmes wearing glasses? A. Yes, I think I seen them on.

Q. I mean Mr. Holmes? A. Yes.

Q. Was he wearing glasses at the time that the shooting took place? A. I don't know.

Q. You were in the car, were you not? A. Yes, I was.

Q. How many shots were fired in that car? A. All that I heard was just one bang. Just loud noises.

Q. Was it one, two, three, or four, or were you able to separate them? A. All that I heard was just one bang and everything was just a loud noise.

Q. Do you know whether the blood on your shirt came

from Mr. Holmes face or not? A. That was never brought up at the last trial.

Q. I will ask you if you were not asked this question on page 325 of the transcript—

> (277) Mr. Haynes: Now, Your Honor, the attorney General is doing exactly what Your Honor instructed him not to. And we object.
>
> The Court: Don't read the questions from the record. Ask the question, if you want to. You can refresh his mind from the record, but don't read from the record.

Q. Do you know Garney Hicks? A. Not that I know personally.

Q. Did you ever see a Garney Hicks that you know of? A. I saw him in the Court Room.

Q. How about Ed Jenkins? A. I know Ed Jenkins.

Q. Charley Bailey? A. Just by seeing him.

Q. Pete Mabe? A. Just by seeing him.

Q. Now, Mr. Stubbs, when the car came to a—was the car still rolling when you got out of it? A. Yes, sir.

Q. And how did you get out of the car? A. I went out head first.

Q. Head first? A. Yes, sir.

Q. Had you gotten those places on your head at that time? A. No, because I landed on my left shoulder.

(278) Q. And what did you do when you got out of the car? A. I got up and run.

Q. Why did you run? A. Just . . . he had the pistol.

Q. How far did you run? A. I don't know, sir, not too far.

Q. That was about what time of the day? A. I don't know, sir. Some people at the last trial said that it was about one thirty or two o'clock.

Q. And you know . . . . you don't know how far you ran? A. It wasn't too far.

William Charles Stubbs—Cross.

Q. Do you know where you ran to? A. To a plowed field.

Q. Did you stop in the plowed field and stand up? A. No, I was running until I passed out. Everything just went black.

Q. Everything went black? A. Yes, sir.

Q. And what time was it when you came to? A. I don't know, sir.

Q. Was it daylight or dark? A. You could see a little bit, but it was just like it is at dusk.

Q. Now, do you know how far you traveled while you were passed out? (279) A. I don't reckon I traveled any place.

Q. But, you were still close to the scene of where this had taken place at? A. Yes, sir.

Q. Now, when Mr. Bernie Webb picked you up, you were where? A. Walking up that little dirt road toward the highway.

Q. And that little dirt road runs back into the highway about two miles this side of Bristol? A. I don't know, sir.

Q. Well, if it has been testified to—

Mr. Haynes: Well, it is . . . it has not been testified to. We object.

The Court: Sustained.

Q. Do you remember having a conversation with Mrs. Holmes in the car as you were passing through Blountville about the next town being Bristol? A. I remember a sign that said Bristol and there was some remark made about it.

Q. Did Mrs. Holmes say that there— A. I do not know who made the remark. I don't recall, I just recall that the remark was made.

Q. Before when you were asked why you left the car, do you remember replying that you were afraid of the police and that you didn't want to get caught? (280) A. No, I do not, sir.

Q. Had you been in trouble with them before?

Mr. Haynes: Now, Your Honor, we excepted to that a minute ago and it was sustained.

The Court: I believe that we have talked about his previous record. Sustained.

Q. Were you asked before why you run and jumped out of the car? A. I don't know.

Q. Were you scared? A. I was.

Q. Mr. Stubbs, let me ask you this, have you ever been convicted of kidnapping, murder, and felonious assault that all that took place at the same time?

Mr. Haynes: We except to that question and move for a mistrial.

The Court: Sustain the objection. Go ahead, gentlemen and let's go.

Mr. Haynes: We except to his Honor's ruling.

The Court: You mean that you except to it being sustained?

Mr. Haynes: Oh no, overruling our motion for a mistrial, if Your Honor please.

The Court: Oh, gentlemen. Go ahead. He hasn't answered it one way or the other, whether he did or didn't. That is no cause for a mistrial. Go ahead gentlemen.

(281) Mr. Haynes: He just asked that question to prejudice the jury.

Mr. Wooten: Alright, come down.

AND FURTHER THIS WITNESS SAITH NOT:

WILLIAM CHARLES STUBBS
BOB CLARK, Court Reporter.

Alex Holm, Rebuttal.

(284) A. Alex Holm, the prosecutor, was recalled—

The Court: Now, wait a minute. Now, go ahead. Excuse me.

A. Alex Holm, the prosecutor, was recalled to the stand in rebuttal, and testified further as follows:

Redirect Examination by Mr. Smith:

Q. You are Mr. Alex Holm, the prosecutor, and you testified in (285) this case on yesterday? A. Yes.

Q. Mr. Holm from the time that you left the roadside park in Hawkins County until you got to the point where your wife met death and you were shot, was this .32 pistol ever lying in the front seat?

The Court: Now, wait a minute. Now, was that objected to?

Mr. Haynes. Yes, sir.

The Court: Was that in the evidence in chief?

Mr. Wooten: I don't remember whether it was or not. I know that Mr. Holm said that it was.

Mr. Haynes: It has already been testified to.

The Court: From my memory, he said that he had it in his hands.

Mr. Haynes: Well, it was sustained, Your Honor.

The Court: Was it sustained?

Court Reporter: Yes, sir.

The Court: Well, go ahead to the next one then. Mr. Holm, at the time that you hit the defendant in the head three or four times with this pistol, had Mrs. Holm been shot one time and you shot twice?

Mr. Taylor: Exception, may it please the Court. That has been gone over on direct testimony of the State's case.

The Court: Isn't that true, gentlemen? Didn't Mr. Holm (286) testify that his wife was shot and he was shot and then he got the pistol and grabbed it out of the defendant's hand.

Mr. Smith: Yes, Your Honor.

Q. Mr. Holm from the time that you left the roadside park until this occurrence near Blountville, was the relationship friendly between you and your wife and the defendant Stubbs or were you and Mrs. Holm afraid of him?

Mr. Taylor: Exception, may it please the Court. That has been gone over and it is evidence in chief.

The Court: Did he answer that?

Court Reporter: Yes, he did, but it was overruled.

The Court: Overruled. I am going to let him answer it, because as I recall now, gentlemen, the proof was that there was friendly relations. I am going to let him answer it.

Mr. Haynes: Note our exceptions.

A. No, sir, there was no friendly relations.

Q. No friendly relationship? No, sir.

Mr. Taylor: We except to the Attorney General repeating the answer.

The Court: I sustain that.

Q. Did he ever ask you to come up and ride in the front seat, Mr. Holm? A. No, sir, I couldn't.

(287) The Court: Now, wait a minute, that is not in rebuttal. I sustain the objection to that.

Q. You say he didn't ask you to come up and ride with him? A. No, sir.

Q. Did you ever request him—

Mr. Taylor: We want to stop here, may it please the Court. I was to except—

The Court: Yeah, skip that objection there.

Q. Mr. Holm, did at any time you ever request this defendant Stubbs to drive your car? A. No, sir.

Mr. Taylor: Just a minute, that is evidence in chief. (Then recross examination by Mr. Taylor.)

The Court: Then I sustain the objection.

Q. Mr. Holm, do you know Mr. Cook? A. Yes.

Q. Who is he? A. He was the undertaker that came out and got me and my wife.

Q. You have told yourself two stories about this, haven't you, Mr. Holm—

The Court: Now, wait a minute. I don't know what the next question is?

Mr. Wooten: We don't want that—

The Court: Is that all you have?

Mrs. Wooten: Yes, Your Honor.

The Court: Come down.

And further this witness Saith Not.

(50963)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-237

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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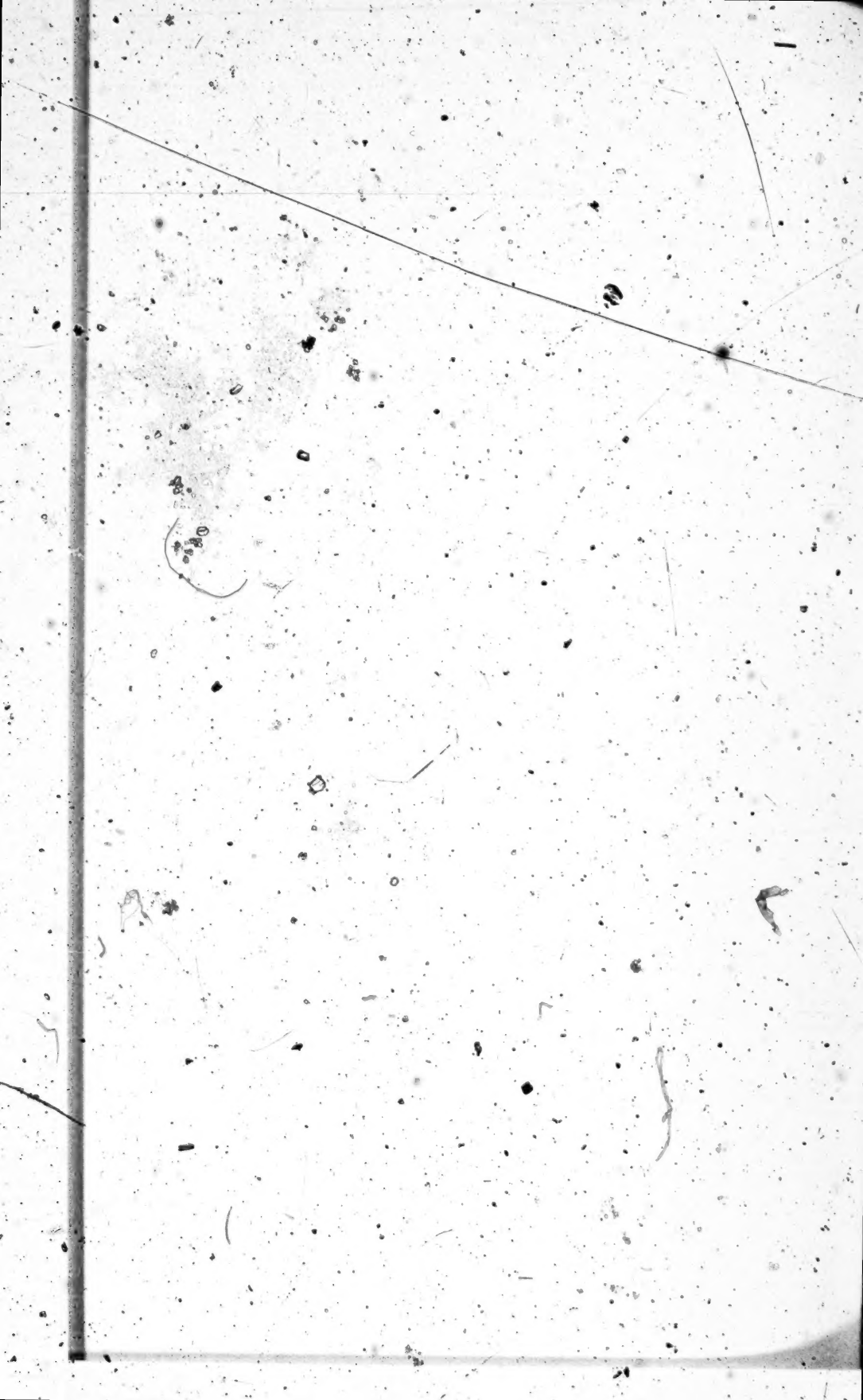

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28 U.S.C. § 1254(1) 2

OTHER AUTHORITY

15 A.L.R. 517 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ....

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. William C. Stubbs* v. *Mancusi*. The judgment was entered on April 19, 1971. Rehearing was denied on May 19, 1971, Judge Moore dissenting; on the same day, the petition for rehearing *in banc* was denied.

Opinions and Orders Below

The orders of the United States Court of Appeals denying the petition for rehearing and rehearing *in banc* are reproduced as Appendix A and Appendix B to this petition. The opinion of the United States Court of Appeals

for the Second Circuit is reported at 442 F. 2d 561, appended hereto as Appendix C. The opinion of the United States District Court for the Western District of New York is not yet reported and is appended hereto as Appendix D.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 19, 1971 reversing the denial of respondent's petition for a writ of habeas corpus by the United States District Court for the Western District of New York. A petition for rehearing or rehearing *in banc* was denied by the Court of Appeals on May 19, 1971.

Questions Presented

1. Whether the rule of due diligence in obtaining the presence of an absent witness precludes the use of prior recorded testimony of a witness who was a permanent resident of another country at the time of respondent's second trial for murder in Tennessee?

2. Whether respondent's right of confrontation was violated at his second trial for murder by the introduction of prior recorded testimony of an unavailable witness, where that testimony had been subject to cross-examination by competent counsel but the trial had later been vacated because counsel had been tardily appointed?

3. Whether the introduction of prior recorded testimony at respondent's second trial was harmless beyond a reasonable doubt, where respondent himself testified at the retrial that he had forced the murder victim and her husband into a car at gunpoint and compelled them to drive to the spot where the shooting occurred?

4. Whether every reasonable hypothesis except guilt must be excluded in order to sustain a conviction on collateral review?

Statement

A

Respondent was convicted in Monroe County, New York in 1966 for assault in the first degree and possession of a firearm. On October 7, 1966 he was sentenced as a second offender to a term of 19-20 years on the assault charge, and 13-14 years on the firearms charge, the sentences to run consecutively.

On June 24, 1968 the Appellate Division, Fourth Department affirmed the conviction without opinion (30 A. D. 2d 777) and reargument was denied on September 19, 1968 (30 A. D. 2d 932). Leave to appeal was subsequently denied by the New York Court of Appeals. On February 24, 1969, this Court denied certiorari (393 U. S. 1108).

The increased punishment imposed upon respondent by the Monroe County Court was predicated upon a 1964 Tennessee conviction upon re-trial for first degree murder on June 11, 1954. Respondent had originally been convicted of the same murder charge in July 1954; however, the original conviction had been reversed by the United States District Court for the Middle District of Tennessee on January 6, 1964 in a habeas corpus proceeding on the grounds of tardy appointment of counsel. *Stubbs* v. *Bomar* (Civil Action 3585, M. D. Tenn.)

B

The crime of which appellant Stubbs was convicted in Tennessee was the murder of Mrs. Alex Holm on June 11, 1954. At the 1964 retrial, Burl A. Holm testified that his parents, Alex and Ruby Holm were driving their car

from their home in Texas through Tennessee; their destination was Providence, Rhode Island, and from that point, they were to fly to Sweden. They met Stubbs at a roadside park between Rutledge and Rogersville, Tennessee, where they had stopped for a picnic lunch.

Stubbs testified that he had been discharged from Texas State Penitentiary in June, 1954 and that he was without money, and was hitchhiking through the South. He had been given a gun by a friend who had been a fellow inmate in prison, and had this gun in his possession when he met Mr. and Mrs. Holm. After their refusal to give him a lift, he forced them at gun point to get into the back seat of their car. With the gun in his hand at intervals pointing into Mrs. Holm's face or on the front seat, Stubbs drove the car through Rogersville, Kingsport and Blountville, Tennessee. Stubbs testified that near Bristol, Tennessee:

> "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in a clear focus, but in a reddish haze. I mean there was no pain or nothing . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and heard this loud roar, bang . . . Stuff started down my face and down my shirt and all that I could think of that he has got the gun . . . I just went outside through the car door (onto the highway)."

After that, Stubbs ran away to the woods, "everything went black" and he awoke after sundown. A passing driver, Mr. Bernie Webb* gave him a lift and they were stopped at a roadblock. Mr. Webb suggested to officers at the roadblock that Stubbs be investigated. He was

---

* Mr. Webb testified that he had picked Stubbs up on the highway, that his shirt was bloody and that they were stopped by the roadblock.

taken to Bristol Jail in handcuffs, then escorted within an hour to the hospital where several head wounds were treated.

Stubbs went on to state that he was taken to Mr. Holm's room in the hospital and that a man (whom he did not recognize as Holm at the time) pointed to him and said: "[T]hat is the one." He denied knowledge that Mrs. Holm was dead, claiming that he was hit on the head and that he did not shoot Mrs. Holm.

Captain Frank Williamson of the Tennessee Highway Patrol testified that on June 11, 1954 he received information about a wrecked car near Blountville. He went to the scene and found an old model Ford with blood inside and the door open. A woman had been shot and a man injured.

Sergeant Seahorn of the Tennessee Highway Patrol testified that after the shooting they were checking cars at a highway roadblock and that when Mr. Webb and appellant Stubbs drove up, Stubbs was arrested. Sergeant Seahorn told Stubbs that he was under arrest in connection with a murder. At the time, appellant had blood on the front of his shirt and his clothes were torn. He explained this blood by saying that he had been fishing and had fallen off a rock cliff. He was searched, and an empty bullet shell and knife were found. Sergeant Seahorn further testified that Stubbs was taken to City Jail and then to the hospital room of Alex Holm, where (in the presence of several other police officers) Holm pointed at Stubbs and said "[T]hat is the man that killed my wife and shot me".

Their testimony was corroborated by Captain Williamson and Sergeant H. P. Montgomery of the Tennessee Highway Patrol. Sergeant Montgomery further said that at the time that Holm identified Stubbs, there was ample light in the room.

Dr. Franklin Buchanan, who attended Alex Holm in the Emergency Room of Memorial Hospital, testified that two bullets had entered Mr. Holm's face, one lodging in the neck, and the other in the nasal passage; both bullets were removed. Despite this injury and the discomfort, Mr. Holm's faculties were intact and his eyes were good; he had brought his glasses with him to the hospital. He identified Stubbs as his assailant. Dr. Charles Harkrader, Jr. testified to the same effect as to Holm's conscious and rational state.

The testimony of Alex Holm, given at Stubbs' 1954 trial, was read into the transcript at the 1964 trial, over counsel's objections; Mr. Holm had in the meantime become a permanent resident of Sweden. Holm had identified Stubbs in court, and had testified that Stubbs had forced him and his wife into their car at gunpoint and threatened to kill them. Stubbs drove the car, keeping his gun in his lap pointed towards them. Mr. and Mrs. Holm were carrying $1,400.00 in traveler's checks and cash. Stubbs began shooting when they were slightly east of Blountville, twice at Holm and once at Mrs. Holm. Holm seized the gun after Stubbs had begun to shoot, another shot went off, and Holm hit Stubbs on the head with the gun 3 or 4 times. Mrs. Holm's body slumped over and Stubbs got out of the car and ran away.

C

Respondent commenced the instant proceeding in the Western District of New York by means of a petition for a writ of habeas corpus. His petition contained ten claims, nine of them directed toward his Monroe County trial and conviction. Respondent's tenth claim was that the 1964 Tennessee conviction was unconstitutionally obtained and as such should not have been made the basis for increased punishment. Respondent alleged that the 1964 Tennessee conviction had been obtained in violation of his Sixth Amendment right of confrontation.

After having examined the record on appeal in the New York Courts, the District Court denied all of respondent's claims on the merits (see Appendix D). On October 7, 1969 the Court of Appeals for the Second Circuit granted respondent a certificate of probable cause, leave to appeal *in forma pauperis* and assignment of counsel. The Court limited the issue on appeal to the constitutionality of the 1964 Tennessee conviction.

On April 19, 1971, the Court below rendered its decision, reversing the decision of the United States District Court. The Court held that respondent had been deprived of his right of confrontation at the Tennessee retrial for murder, because the testimony of a witness proven to be residing in Sweden was read into the record, and because counsel at the first trial had been tardily appointed and had not attempted to establish that after Stubbs had kidnapped the Holms at gunpoint, they had made him welcome as a "guest" (7a-8a).*

The court further held that although respondent had himself testified at the retrial that he had forced Mr. and Mrs. Holm into a car at gunpoint and compelled them to drive to the spot where the shooting occurred, the harmless error doctrine did not apply because there was an absence of testimony on the part of Holm as to whether the kidnapper had become their "guest", and thus a reasonable hypothesis as to the shooting could still be conceived (8a).

Reasons for Allowance of Writ

1. The decision below constitutes a significant departure from the prior decisions of this Court.

A

The court below, citing this Court's decision in *Barber v. Page*, 390 U. S. 719 (1968), held that "[a]bsence from

*Numbers in parentheses refer to the appendix herein.

the continental United States is not per se a sufficient reason to broaden the exception to the Confrontation Clause allowing the admission of prior testimony of a presently unavailable witness'' (7a). In so ruling, the court misapprehended the rationale in Barber, which dealt with the issue of whether a defendant's right of confrontation was denied at his trial by the reading of preliminary hearing testimony of a witness who was then imprisoned in another State. Since the absent witness was incarcerated in a federal prison in Texas, 225 miles from the trial court, it is clear that this Court's decision was directed toward a situation where it was legally and physically possible to produce the missing witness.

Thus, this Court observed that increased cooperation between the States themselves and the federal government had largely diminished the theory that absence from a jurisdiction was a ground for dispensing with confrontation because the process of a trial court could not go beyond its territorial limits. It was also noted that in the case of prospective witnesses in federal custody, the federal courts had the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities, and that the United States Bureau of Prisons permitted federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus *ad testificandum* issued out of state courts.

By contrast, the prior recorded testimony of the witness in the case at bar was that of an elderly man of Swedish nationality who had returned to and become a permanent resident of Sweden and, therefore, was not available to Tennessee for respondent's retrial for first degree murder. Respondent's position is that this fact alone invalidates his Tennessee conviction and precludes its use as a predicate for finding him a second felony offender after conviction in Monroe County, New York, of first degree assault and possession of a firearm. This situation is totally unlike *Barber,* but similar to several other recent decisions where

a witness was demonstrated to be living on a foreign continent at the time of trial.

In *People* v. *Benjamin*, 83 Cal. Rptr. 764 (Ct. of App. 1970), for example, defendant claimed at his trial for robbery in the second degree, that the introduction of preliminary hearing testimony of a missing witness violated his right of confrontation. The prosecution established that it had been advised by a legal officer of the Marine Corps that the missing witness was on military duty in Vietnam and would be unavailable for trial. On the basis of this evidence, the Court of Appeals upheld the trial judge's finding that the witness was unavailable as a matter of law and that reasonable diligence would not have caused him to appear as a witness. Accordingly, the admission of the witness' pre-trial testimony was found to be proper.

And in *People* v. *Ashford*, 71 Cal. Rptr. 619 (Ct. of App. 1968), the missing witness had testified against defendant in a retrial for robbery in the second degree, and been cross-examined at a preliminary hearing and a prior trial. At the time of defendant's second trial, the missing witness was at a convention in Florida, and was thereafter planning to travel in the Caribbean and in the western United States. While the Court noted that the better practice would have been to adjourn the second trial until the missing witness returned to California, it upheld defendant's conviction on the ground that he was not deprived of his full Sixth Amendment right of confrontation, but only that aspect of the right of confrontation which entitled him to have the trier of fact observe the witness' demeanor while being subjected to interrogation.

In *Goldwasser* v. *Brown*, 417 F. 2d 1169 (D. C. Cir. 1969), a former English teacher sought review of a proceeding in which he was discharged from civilian service with the Air Force for having made unauthorized statements to his students. The students were foreign military officers who

had subsequently returned to their native countries at the time the disciplinary hearing took place. Notwithstanding plaintiff's argument that the hearing was defective because these witnesses should have been produced by the Air Force upon his request, the Court stated that plaintiff's access to these witnesses prior to their departure from the United States prevented plaintiff from claiming unfairness at the hearing amounting to a violation of the Constitution. The Court noted that the Civil Service Commission did not have subpoena power to compel the attendance of witnesses, and further noted that these foreign students were not under the control of the Air Force.

Cases which have found that due diligence should have been exercised to obtain the presence of an absent witness, have involved situations where the witness might have been in the jurisdiction (*Holman* v. *Washington*, 364 F. 2d 618 [5th Cir. 1966]; *Wilson* v. *Bowie*, 408 F. 2d 1105 [9th Cir. 1969]; and *Government of Virgin Islands* v. *Aquino*, 378 F. 2d 540, 551 [3rd Cir. 1967]). In *Aquino*, for example, the witness was a stewardess on a Norwegian freighter. The Court there held:

> "So far as the record shows, therefore, the complainant might have been residing continuously in the Virgin Islands ever since the preliminary hearing was held. She might have been aboard a vessel which was in St. Thomas at the time of trial. *In these circumstances* it cannot be said that the prosecution satisfactorily established the burden which rested on it to show that she was unavailable at the time of trial." (Emphasis added.)

In the instant case the State of Tennessee ascertained the location of the missing witness and introduced testimony as to his whereabouts. Having established that the missing witness was permanently residing in Ekskogen, Sweden, there was little more the prosecution could have

done in view of the great distance between Sweden and the place of trial (approximately 4,000 miles), the expense of travel from such a distance, and the witness' immunity from any form of process issued by the State of Tennessee. The Supreme Court of Tennessee, in affirming the Tennessee conviction (*Stubbs* v. *State,* 216 Tenn. 567, 393 S.W. 2d 150), held at 154:

> "The Uniform Law to Secure Attendance of Witnesses, T.C.A. § 40-2429 et seq., is limited to apply to any state, territory of the United States or District of Columbia. The Criminal Court of Sullivan County, who tried Stubbs, had no effective or compulsory process in Ekskogen, Sweden."

The Court referred to 15 A.L.R. at page 517 for the rule that:

> "It seems logical to hold that, if death permits the reproduction of the testimony of the witness, his absence beyond the jurisdiction of the court, so that his presence cannot be secured at the trial, would require the same result. The courts have quite generally adopted such ruling."

It is clear that no "due diligence" rule can properly be applied here.

B

The Court below also held that tardy appointment of counsel at respondent's first trial deprived respondent of his right of confrontation, in clear contravention of this Court's holding in *Chambers* v. *Maroney,* 399 U.S. 42 (1970), that tardy appointment of counsel *per se* neither requires reversal of every conviction nor an evidentiary hearing to determine whether the right to counsel has been violated. This Court also noted:

> "No charge is made that [counsel] was incompetent or inexperienced, rather the claim is that his appear-

ance for petitioner was so belated that he could not have furnished effective legal assistance at the second trial." (399 U. S. at 53.)

In the instant case, respondent's first trial had been vacated by the United States District Court for the Middle District of Tennessee* solely on the grounds that there was insufficient time to prepare a defense. Respondent was represented by three members of the Bar and the recorded testimony read into the 1964 trial transcript indicates that these attorneys handled the examination of the complaining witness capably.

Mr. McInturff, one of the three counsel, made numerous objections during the course of Mr. Holm's testimony. The cross-examination was handled by a co-counsel, Mr. Taylor, who attempted to show that respondent had no intention of killing anyone; Mr. Taylor questioned Alex Holm closely as to whether defendant could have shot both him and his wife and taken their car when they first encountered each other at the picnic site. Counsel further attempted to establish that respondent had told Holm and his wife that all he wanted was a ride to Bristol.

Thus, it is plain on the record that respondent's 1954 counsel did in fact effectively cross-examine Alex Holm. Indeed, the suggestions of respondent's later attorneys at his retrial as to how they would have handled the cross-examination do not significantly improve upon the earlier trial techniques used. Most of the suggestions involved merely minor points, except that counsel would have asked Mr. Holm whether he carried insurance on his wife's life. This kind of attempt to impugn Mr. Holm could have been utilized by his 1954 counsel, as it would have taken no preparation time; however, it is probable that as a matter of strategy, Mr. McInturff and Mr. Taylor did not do so because they felt it would further antagonize the jury. Mr.

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* *Stubbs* v. *Bomar* (Civil action 3585, M.D. Tenn.).

Holm had himself been shot twice in the face and an attempt to insult him would only have underlined his personal tragedy.

The courts below suggested that the cross-examination was defective because counsel had failed to ask Mr. Holm whether the kidnapper had been made "welcome" once the Holms grew better acquainted with him (8a). This line of questioning would not, of course, have needed any preparation time and thus the tardy appointment of counsel is irrelevant in assessing cross-examination; moreover, such questioning would also have been rejected by trial counsel as a matter of strategy, since it would have appeared to the jury to be sarcastic. As to such strategic decisions, the attorney must be the manager of the lawsuit. *Williams* v. *Beto,* 354 F. 2d 698 (5th Cir. 1965); *Nelson* v. *People of the State of California,* 346 F. 2d 73, 81 (9th Cir. 1965), *cert. denied* 382 U.S. 963.

In addition to the opportunity to cross-examine, the other important benefits included in the right to confrontation were also preserved in respondent's 1954 trial. As summarized in this Court's decision in *California* v. *Green,* 399 U.S. 149 (1970), the defendant must have an opportunity to confront the witness personally in order to test his recollection; sift his conscience; compel him to stand face to face with the jury so that they can judge his demeanor; and to compel him to testify under oath with knowledge of the penalty for perjury. All these factors were present when Holm originally testified.

This Court recently indicated in *Dutton* v. *Evans,* —— U. S. ——, 91 S. Ct. 210, 220 (1970):

> "The decisions of this Court made it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluat-

ing the truth of his prior statement.' California v. Green, 399 U. S. at 161, 90 S. Ct. at 1936."

Such accuracy is assured in the case at bar. Justice Harlan's concurring opinion in *Dutton* (91 S. Ct. at 223), also indicated that *California* v. *Green* should not be interpreted so as to require the prosecutor to produce available witnesses in preference to other types of proof.

Thus, no basis remains for the exclusion of Holm's testimony from the 1964 retrial.

2. The decision below conflicts with the law in four other circuits.

In ruling that respondent's own testimony admitting the gun-point kidnapping of Mr. and Mrs. Holm, was insufficient in itself to sustain his Tennessee conviction because another hypothesis as to the shooting might be conceived, the court below in effect eliminated the harmless error rule except where a federal court finds that the trial jury could have reached no other conclusion but guilt—a more rigorous standard than is applied on direct appeal. This interpretation is in conflict with the law of four other circuits, which have held unequivocally that even where a prosecution is based upon circumstantial evidence (rather than defendant's own testimony, as here), it is not necessary to preclude every reasonable hypothesis except guilt in order to uphold a conviction. *United States* v. *Boyle*, 402 F. 2d 757 (3rd Cir. 1968), *cert. denied* 394 U.S. 934; *United States* v. *Chappell*, 353 F. 2d 83 (4th Cir. 1965); *United States* v. *Luxemberg*, 374 F. 2d 241 (6th Cir. 1967); *Bailey* v. *United States*, 410 F. 2d 1209 (10th Cir. 1969), *cert. denied sub nom. Freeman* v. *United States*, 396 U.S. 933; *Early* v. *United States*, 394 F. 2d 117 (10th Cir. 1968), *cert. denied* 393 U.S. 1003; *Golubin* v. *United States*, 393 F. 2d 590 (10th Cir. 1968), *cert. denied* 393 U.S. 831.

It is important to note that Mr. Holm's testimony was cumulative on the question of Stubbs' identity, the owner-

ip of the gun and the fact of the kidnapping. Even if olm had been murdered like his wife, rather than shot ice in the face, Stubbs' own testimony alone could clearly ve supported the verdict. However, the court below held at the *absence* of testimony on the part of Holm as to ether Stubbs had "gained their sympathy during the urse of the trip and in effect became their guest" was t "harmless beyond a reasonable doubt" (8a). The cond Circuit's rationale was that since the "guest" eory was "the core of Stubbs' defense",* cross-examina-n of Holm on this point was "central" because it might ve supported Stubbs' claim.

Analysis of Stubbs' testimony alone renders the hypoth-s that his victims made him welcome wholly impos-le to support. Despite his attempts to persuade the lms to allow him to ride with them, he was categorically used—until he threatened them with his gun. Stubbs d no job prospects and no money and no particular tination to which he merely needed transportation. The lms' suggestion that he "put his gun on the seat [of car]" (8a) was an alternative to his pointing it into s. Holm's face rather than an expression of friendship. e final refutation of the "guest" theory was Stubbs' n testimony that he was struck on the head as they drove ng—hardly the act of a host.

The Tennessee Supreme Court pointed out that Stubbs admitted that "he forced Axel Holm and his wife at tol point to get into the back seat of their automobile" 3 S. W. 2d at 155). Both the Tennessee shooting and New York conviction for assault in the first degree and session of a firearm, involved crimes of brutal violence.

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* The trial transcript, however, indicates that the "core" of the nse was that Stubbs had suddenly been struck on the head as drove along, that he heard a roar, and then he felt a pain and away.

As noted by Judge Moore in the dissenting opinion below (9a):

> "Here is presented an extraordinary example of 'justice' dispensed by the federal courts. Stubbs, the appellant, released from a Texas penitentiary in June 1954, a few days later kidnapped at gunpoint in Tennessee a Mr. and Mrs. Holm and forced them to accompany him in their car. While on the road he murdered Mrs. Holm apparently 'in cold blood' and attempted to murder Mr. Holm, wounding him twice. Stubbs was apprehended shortly thereafter at a roadblock. He tried to explain the blood on his clothing by attributing it to an accident while fishing. Stubbs was taken to the hospital to which Holm had been taken. There, in the presence of police officers and a doctor, Holm identified Stubbs as 'the man that killed my wife and shot me.'"

Judge Moore also noted:

> "Stubbs is not seeking relief from his Tennessee conviction as such but simply from its use to support a longer sentence for his subsequent New York conviction. The attack now made on the Tennessee conviction is purely collateral."

It is respectfully urged that, in requiring appellant to exclude every reasonable hypothesis except guilt in order to show the applicability of harmless error, the court below not only contravened precedent in other circuits but has also held the State to such a stringent standard that virtually any trial error would mandate invalidation of the State conviction. Thus, the harmless error doctrine, *Harrington* v. *California*, 395 U.S. 250 (1960), which is designed to avoid the necessity for setting aside convictions for small errors or defects that have little likelihood of having changed the trial result, would be seriously undermined.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: New York, New York, August 12, 1971.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
Assistant Attorney General
of Counsel

Appendix A—Denial of Petition for Rehearing.

34449

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES ex rel. WILLIAM C. STUBBS,

Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,

Respondent-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY

ARLIN M. ADAMS

Circuit Judges

LEONARD P. MOORE, U.S.C.J.
dissents.

May 19, 1971.

Appendix B—Denial of Petition of Rehearing In Banc.

34449

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES ex rel. WILLIAM C. STUBBS,

Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,

Respondent-Appellee.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

May 19, 1971.

Appendix C—Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 126—September Term, 1970.

(Argued October 26, 1970 Decided April 19, 1971.)

Docket No. 34449

UNITED STATES OF AMERICA *ex rel.* WILLIAM C. STUBBS,

Petitioner-Appellant,

—against—

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Respondent-Appellee.

Before:

MOORE, FRIENDLY and ADAMS,*

Circuit Judges.

Appeal from denial of petition for habeas corpus by the District Court for the Western District of New York, Harold P. Burke, *Judge,* challenging sentence imposed as second felony offender.

Reversed.

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* United States Circuit Judge of the Court of Appeals for the Third Circuit, sitting by designation.

Appendix C—Decision of the United States Court of Appeals for the Second Circuit.

BRUCE K. CARPENTER, Dunkirk, New York (Woodin & Carpenter, Dunkirk, New York, of counsel), *for Petitioner-Appellant.*

MARIA L. MARCUS, Assistant Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General of the State of New York, New York and Samuel Hirshowitz, First Assistant Attorney General, New York, New York, of counsel), *for Respondent-Appellee.*

ADAMS, *Circuit Judge:*

Relator Stubbs was convicted in Monroe County, New York in 1966 for first degree assault and possession of a firearm. The County Court considered a prior conviction of murder obtained against Stubbs in Tennessee, found him to be a second felony offender, and sentenced him to consecutive terms of imprisonment totalling thirty-two to thirty-four years.[1] Stubbs here challenges his sentence, alleging that his prior felony conviction in Tennessee was constitutionally invalid. The Honorable Harold P. Burke, District Judge of the District Court for the Western District of New York, denied Stubbs' application for a writ of habeas corpus, and relator appealed.

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[1] Under former New York Penal Law, §§ 241, 1897 [present New York Penal Law §§ 120.10, 265.05 (McKinney 1967)], Stubbs could have been sentenced to a maximum of seventeen years as a first felony offender on these charges. The sentence was increased under the authority of former Penal Law § 1941 (compare present § 70.10). Stubbs was also convicted of the felony of breaking and entering in Texas in 1953. As far as the record in the present case reveals, the 1953 conviction remains available as a predicate for increased punishment under § 1941. Present Penal Law § 70.10 would not govern resentencing because of the effective date expressed in § 5.05. Cf. *Gerberding* v. *Swenson*, 435 F.2d 368 (8th Cir. 1970).

Appendix C—Decision of the United States Court of Appeals for the Second Circuit.

Stubbs was first convicted of a vicious murder in Tennessee in 1954. This conviction was vacated in 1964 when the Honorable William E. Miller, United States District Court for the Middle District of Tennessee, found Stubbs to have been denied, because of late appointment, the effective assistance of counsel. *Stubbs* v. *Bomar,* Civil Action 3585 (M.D. Tenn., filed January 6, 1964). At retrial, the prosecution's primary witness did not appear, but his testimony from the first trial was read over defense objections, and Stubbs was convicted. This conviction was upheld by the Supreme Court of Tennessee. *Stubbs* v. *State,* 216 Tenn. 567 (1965).

The critical issue before us is whether relator's 1964 Tennessee conviction was obtained in violation of his right —under the Sixth Amendment to the Constitution—to be confronted with the witnesses against him, and thus was an improper predicate for increased punishment.[2]

The facts underlying the Tennessee conviction are as follows: Mr. and Mrs. Holm were driving through Tennessee on their way from Texas to Rhode Island for an eventual journey to Sweden. Stubbs asked Mr. and Mrs. Holm at a roadside park for a ride, but was refused. He then forced them at gunpoint to permit him to drive their car while the Holms rode in the back seat. Stubbs claimed that when they were near Bristol, Tennessee, he was suddenly struck on the head and he heard a loud bang, the car hit a tree and Stubbs then fled. The police were called to investigate the wrecked car, and they found Mrs. Holm dead by a gunshot wound, and Mr. Holm shot twice in the face. Stubbs was soon apprehended in a police road-block. From his hospital bed, Mr. Holm identified Stubbs as the man who shot him and his wife. Three days before his trial, three attorneys were appointed to defend Stubbs,

[2] See *Burgett* v. *Texas,* 389 U.S. 109 (1967).

and they requested and were refused a continuance to prepare the defense. At trial, Mr. Holm was the state's primary witness, and Stubbs was convicted.

By the time of the 1964 retrial, Mr. Holm had become a permanent resident of Sweden, but had not relinquished his American citizenship. No effort was made by the state to obtain Holm's attendance at this trial. Instead, Holm's son was brought from Texas to testify that his father was presently residing in Sweden whereupon Holm's prior testimony was admitted over objection.[3] The propriety of the admission of that evidence, in light of *Barber* v. *Page*, 390 U.S. 719 (1968) and *California* v. *Green*, 399 U.S. 149 (1970), is here in question.[4]

As noted by the Supreme Court in *Green*, "the particular vice which gave impetus to the [Confrontation Clause] was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." 399 U.S. at 156. A traditional exception to the confrontation requirement has been the introduction of testimony of a witness who is now unavailable, but who previously testified subject to cross-examination at judicial proceedings against the same defendant. E.g., *Mattox* v. *United States*, 156 U.S. 237 (1895). While the scope of the Confrontation Clause is not coextensive with the rules of hearsay and their exceptions,[5]

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[3] *See generally* 5 Wigmore, *Evidence*, §§ 1396, 1404 (3d ed. 1940); *Note, Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966).

[4] In *Berger* v. *California*, 393 U.S. 314 (1969), the Supreme Court directed that *Barber* v. *Page* should "be given fully retroactive application."

[5] *California* v. *Green*, *supra*, at 155-156.

"necessity"[6] is a factor common to both that may justify the use of prior recorded testimony in limited instances of genuine unavailability. The test for such use is whether "the prosecutional authorities have made a good-faith effort to obtain [the witness'] presence at trial." *Barber* v. *Page, supra* at 725. No such effort was made here, and Holm's testimony was improperly admitted into evidence. Where there is no showing that a witness beyond the effective reach of a court's subpoena will refuse to return voluntarily to testify if requested, the prosecution may not introduce prior testimony without demonstrating a reasonable effort to secure his presence. Cf. *Virgin Islands* v. *Aquino*, 378 F.2d 540 (3rd Cir. 1967); *Owens* v. *Eyman*, 434 F.2d 1962 (9th Cir. 1970). Absence from the continental United States is not per se a sufficient reason to broaden the exception to the Confrontation Clause allowing the admission of prior testimony of a presently unavailable witness. For although there is a much greater chance that it will not be possible to bring before the court a witness residing abroad, " 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' " *Barber* v. *Page, supra*, at 724, quoting with approval Judge Aldrich's dissent in the Court of Appeals, 381 F.2d 479, 481 (10th Cir. 1967).

New York urges that even if Holm's testimony was erroneously admitted in the 1964 trial, such error was harmless beyond a reasonable doubt within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967).[7] Relator answers that Judge Miller found Stubbs did not have effective assistance of counsel at his 1954 trial, so that his right of cross-examination may not have been satisfied

[6] See *California* v. *Green, supra*, at 167, footnote 16.

[7] See also, *Note, Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814 (1970).

even initially. Judge Miller's decision, however, even if it were binding on New York, would not establish the ineffectiveness of the cross-examination of Holm, but only the prejudice to the totality of defense preparation from late appointment of counsel.

Nevertheless, it is clear as Stubbs' 1964 counsel recognized that Holm was not questioned regarding the core of Stubbs' defense—namely, that while Stubbs originally forced himself on the Holms, he gained their sympathy during the course of the trip and in effect became their guest. This claim was significant because even if Stubbs fired his pistol accidentally (he denied firing at all), he might still be found guilty of felony murder unless the felony of kidnapping had ended. Stubbs' story was given some plausibility by his testimony that he forced himself on the Holms from desperation and hunger; they made him welcome when he explained his motivation; Mrs. Holm suggested he put his gun on the seat to avoid it being seen while driving through a town; and they drove past a policeman without the Holms making any outcry. While all of the above may also be explained by the Holms' fear of Stubbs, we cannot declare the absence of any examination of Holm—the only eye-witness to the alleged crime—on this point to be harmless beyond a reasonable doubt. Compare *Burgett* v. *Texas, supra,* at 115 with *United States ex rel. Moore* v. *Follette,* 425 F.2d 925 (2nd Cir. 1970). Whether the test is one of overwhelming evidence or of untainted evidence,[8] the error of admitting Holm's testimony at Stubbs' second trial was central to Stubbs' conviction, rather than harmless to his case.

The dissent makes an appealing case for using the Tennessee conviction to augment on the New York sentence.

[8] See 83 Harv. L. Rev. at 817-820.

It essentially employs the "bad man" approach. However, it fails to cite any cases to support such position and also fails to demonstrate where the cases relied upon here are either unearned or inappropriate.

MOORE, *Circuit Judge* (dissenting):

Here is presented an extraordinary example of "justice" dispensed by the federal courts. Stubbs, the appellant, released from a Texas penitentiary in June 1954, a few days later kidnapped at gunpoint in Tennessee a Mr. and Mrs. Holm and forced them to accompany him in their car. While on the road he murdered Mrs. Holm apparently "in cold blood" and attempted to murder Mr. Holm, wounding him twice. Stubbs was apprehended shortly thereafter at a roadblock. He tried to explain the blood on his clothing by attributing it to an accident while fishing. Stubbs was taken to the hospital to which Holm had been taken. There, in the presence of police officers and a doctor, Holm identified Stubbs as "the man that killed my wife and shot me."

Stubbs was indicted in the Criminal Court in Tennessee on July 8, 1954 and arraigned the next day, July 9, 1954. The Trial Judge immediately appointed three members of the County Bar to represent Stubbs. Although counsel moved for a continuance for additional time to prepare a defense (a practice not unusual for defense counsel), the trial was set for, and proceeded on, July 12, 1954.

In addition to other witnesses, Holm testified to the facts of the kidnapping, the murder of his wife and his own wounding. There is no indication in the record that Stubbs' counsel did not have a full opportunity to cross-examine Holm. The jury convicted Stubbs or four indictments,

murder in the first degree, assault with intent to murder and two counts of kidnapping. He was sentenced to concurrent terms of 99 years and 21 years.

Ten years passed. Stubbs by habeas corpus petition then advanced the claim in a federal court in Tennessee that his 1954 conviction should be set aside. The federal judge, in my opinion, quite erroneously, granted the petition on the ground that "the petitioner was denied effective representation by counsel" in that "Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial" and, declaring the first trial "null and void," remanded Stubbs for further prosecution.

On the second trial in 1964 the State called fifteen (15) witnesses, including the three (3) Highway Patrolman and a Police Investigator who were present in Holm's hospital room on June 11, 1954 and who testified to Holm's identification of Stubbs as the murderer and assailant. The testimony of another eye-witness who had died in the ten-year interval was introduced from the transcript. Holm had returned to Sweden where he was in residence. His 1954 testimony was also introduced from the transcript.

Again Stubbs was convicted of first degree murder and sentenced to twenty years and one day. The Supreme Court of Tennessee reviewed and affirmed the conviction. In an opinion by the Chief Justice, the court considered and ruled upon with approval the introduction of the Holm testimony from the transcript. There was, however, a modification of the sentence. Stubbs urged that he was entitled to a credit of his pre-trial imprisonment since 1954 and with this claim the court agreed.

How and why Stubbs was released from Tennessee is not revealed but 1966 finds him in New York State pur-

suing his calling and convicted in Monroe County of first degree assault and possession of a gun. Sentences (as a first offender) could have been imposed of sixteen to seventeen years. However, because of the 1964 Tennessee conviction, Stubbs was a second felony offender and, under New York Penal Law, § 1941 (then, and to this case on remand, currently, applicable), was subject to the sentence actually imposed of thirty-two to thirty-four years. Parenthetically, although not mentioned below, I see no reason why the County Court should not be able to consider the Texas conviction as a predicate to second offender treatment on any re-sentence.

All this background material, although not irrelevant to the issue before us, has caused the majority to divert its attention to Tennessee instead of to New York. Stubbs is not seeking relief from his Tennessee conviction as such but simply from its use to support a longer sentence for his subsequent New York conviction. The attack now made on the Tennessee conviction is purely collateral. On the merits I would hold that we should respect the decision of the Tennessee Supreme Court on the subject of the admission of Holm's 1954 testimony via the transcript.

Adverting momentarily to the merits of admitting Holm's transcript testimony, the facts definitely show, in contrast to widely differing facts in cases cited, that Holm was beyond the jurisdiction of the Tennessee courts even with federal aid. See *Barber* v. *Page*, 390 U.S. 719 (1908). Therefore, I do not find it necessary to restrict the permissive categories to death and connivance. Enough flexibility should exist in the law to consider the facts of each case in relation to availability and importance.

All of Stubbs' present arguments about lack of confrontation are but a smoke-screen. He and his counsel confronted Holm; his counsel cross-examined Holm; the issues

and facts were not complex. More important, however, is the fact that on the 1964 trial, many eye-witnesses and ear-witnesses testified. Stubbs undoubtedly would have been convicted wtihout the use of Holm's testimony. Of course it was important as an ingredient but so is almost all testimony placed in the category of harmless error. If harmless error be a factor on direct appeals, how much the more so should it be on collateral attacks!

In my opinion the able argument advanced by Stubbs' counsel has sought to divert us (and succeeded as to the majority) into paths of constitutional and hackneyed generalities. We all recognize the rights of confrontation and cross-examination. However, the many cases cited based on other and different facts are not dispositive here.

I would affirm the denial of the writ but at the very least would have the majority give more explicit instructions to the County Court on the possibility of regarding the Texas conviction as a predicate for the potential new sentence under § 1941 of the New York Penal Law.

Appendix D.—Decision of the United States District Court for the Western District of New York

UNITED STATES DISTDICT COURT

WESTERN DISTRICT OF NEW YORK

Civ. 1969-136

UNITED STATES ex rel. WILLIAM C. STUBBS

v.

VINCENT R. MANCUSI, Warden, Attica State Prison

Petitioner pro se.
Richard R. Jenczka, Assistant Attorney General of New York, for the respondent.

FINDINGS OF FACT

1. The petitioner is held on a judgment of Monroe County Court following a trial, where he was found guilty of the crimes of assault, first degree, and a violation of Section 1897, Subdivision 2 of the former New York Penal Law, a felony. He was sentenced on October 7, 1966 to a term of 19 to 20 years on the assault, first degree charge, and to a term of 13 to 14 years on the firearms charge, as a second felony offender, the sentences to run consecutively.

2. His claims in this proceeding are as follows: (1) The search which disclosed the revolver and other articles in the closed glove compartment of the defendant's automobile was unlawful; the evidence should have been suppressed. (2) The evidence offered as to both assault and

possession of a weapon was insufficient as a matter of law; the verdict was also against the weight of the evidence. (3) The police lieutenant was improperly permitted to testify to inflammatory conclusions made by him before the arrest; Mr. Wunder was permitted to give inflammatory hearsay testimony. (4) The erroneous instructions by the trial judge, although not excepted to, require a new trial. (5) The prosecuting attorney was improperly permitted to indulge in an inflammatory summation. (6) The trial judge committed prejudicial error by permitting the jury to take exhibits into the jury room, when the defendant refused to consent. (7) At the trial, to prove the defendant's identity as to a prior felony, the trial judge committed prejudicial error by refusing the defendant preemptory challenges in the selection of the jury. (8) The trial judge improperly disclosed to the jury trying the identity issue, the fact that the defendant stood convicted of a felony in New York. (9) The predicate conviction in Tennessee was unconstitutionally obtained and should not have been made the basis for increased punishment. (10) The sentence is too severe and should be reduced.

3. The conviction was affirmed by the Appellate Division, 30 A. D. 2d 377. Re-argument was denied, 30 A. D. 2d 932. The Court of Appeals of New York denied permission to appeal. Certiorari was denied February 24, 1969.

4. Pursuant to an order of this court dated April 21, 1969 the respondent has produced for this court's examination the record on appeal to the Appellate Division and the briefs of the respective parties in the Appellate Division. The presence of the petitioner was not required on the return of this order to show cause.

5. The petitioner has exhausted available state remedies. The papers produced are sufficient to allow this court

to determine the questions presented in this proceeding. There is no need for a further hearing.

6. On the evidence before me I find: (1) The search of defendant's automobile was lawful. It was incidental to a lawful arrest. The fruits of the search were properly received in evidence. (2) There was ample evidence to support the verdict of the jury both as to assault and to possession of a weapon. The verdict was not against the weight of the evidence. (3) There is no merit to petitioner's claim that the police lieutenant was improperly permitted to testify to inflammatory conclusions made by him before the arrest, and that Mr. Wunder was permitted to give inflammatory hearsay testimony. There were no erroneous instructions by the trial judge to the jury. (5) The summation of the prosecuting attorney was not inflammatory or prejudicial to the rights of the petitioner. (6) There was no error on the part of the trial judge in permitting the jury to take exhibits into the jury room, when the defendant refused to consent. (7) The petitioner's claim that, at the trial to prove the defendant's identity, the trial judge committed prejudicial error by refusing the defendant's preemptory challenges in the selection of the jury, presents no federal question. (8) There is no merit to the petitioner's claim that the trial judge improperly disclosed to the jury trying the identity issue, the fact that the defendant stood convicted of a felony in New York. (9) The predicate Tennessee conviction was not obtained in violation of petitioner's rights under the Federal Constitution. (10) The sentence was not excessive.

7. The conviction and sentence under attack in this proceeding was not obtained in violation of the petitioner's rights under the Federal Constitution.

Appendix D—Decision of the United States District Court for the Western District of New York.

CONCLUSION OF LAW

1. Petitioner's application for a writ of habeas corpus is denied upon the merits.

IT IS HEREBY SO ORDERED.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

HAROLD P. BURKE,
U. S. District Judge.

June 30, 1969.

(49862)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-237

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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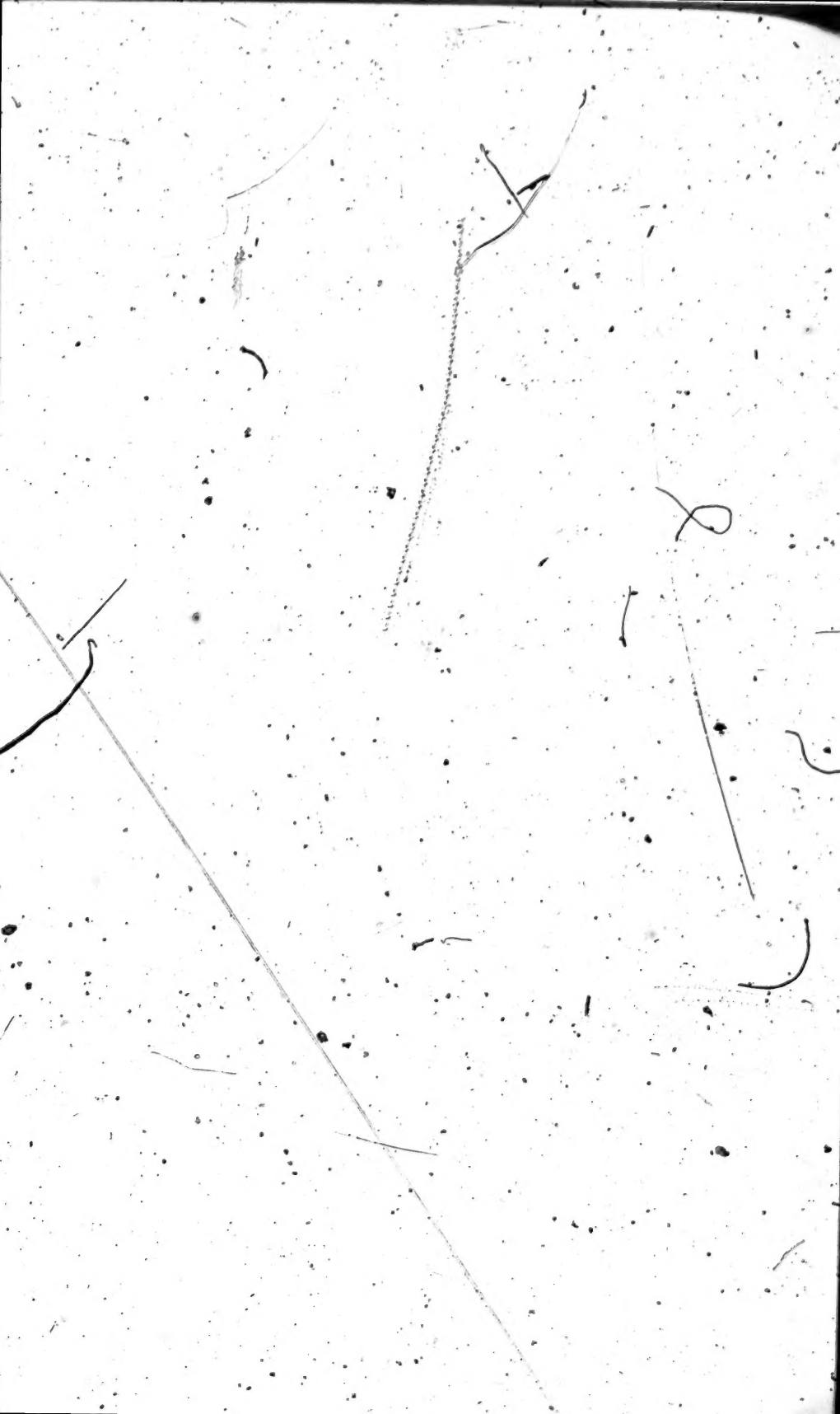

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-237

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF CASE

An earlier Tennessee conviction was used by the State of New York to give the respondent William C. Stubbs increased punishment following a New York conviction. After exhausting his state remedies, Mr. Stubbs applied for habeas corpus relief to the United States District Court for the Western District of New York. In *United States* ex rel. *Stubbs* v. *Mancusi*, 442 F. 2d 561, the Court of Appeals for the Second Circuit reversed with one judge dissenting, the decision denying relief. On May 19, 1971 a petition for rehearing was denied, and a suggestion for argument *in banc* was denied, no active circuit judge having been heard in favor; the respondent Stubbs is to be resentenced in the Monroe County Court of the State of New York.

The court below held that in the light of *Barber* v. *Page*, 390 U. S. 719, 724-725, *Berger* v. *California*, 393 U. S. 314, 315, and *California* v. *Green*, 399 U. S. 149, the Tennessee

conviction had been obtained in violation of the confrontation clause of the Sixth Amendment. At the Tennessee trial the prosecution's primary witness did not appear, but earlier testimony of his was read into evidence. No effort had been made by the prosecuting authorities in Tennessee to obtain this witness' attendance at the trial. It was shown only that the witness had moved to Sweden.

ARGUMENT

I. *The record as not clearly presenting the issues sought to be raised.*

The petitioner seeks to raise four questions, all relating to the validity of the Tennessee conviction (see pp. 2-3 of the petition). A transcript of the Tennessee trial is not included in the present record.[1] The crucial records came to the attention of the Court of Appeals below, because both of the present parties invited judicial notice of them. The interests of justice led the court below to sift through records from many places before striking down the Tennessee judgment.

The peculiar circumstances of this case, furthermore, have prevented the government of Tennessee from being heard below. Mr. Stubbs' second Tennessee trial took place in 1964 and his New York trial in 1966. The parties both in Tennessee and New York did not then have a chance to focus upon the present issues in the light of the controlling

[1] In denying relief the United States District Court for the Western District of New York noted that it had considered only the records of the New York proceedings (¶ 4 of the decision, reproduced as appendix D to the petition for certiorari, p. 41a). Neither did the New York Monroe County Court consider them before imposing sentence. See pp. 44-55 of the transcript of proceedings of October 6, 1966.

decision, *Barber* v. *Page*, 390 U. S. 719, which was handed down in 1968.

This Court may well conclude that the present record is not sufficiently clear and specific to warrant decision upon the constitutional questions sought to be raised by the petitioner. Compare *Massachusetts* v. *Painten*, 389 U. S. 560, 561 and the opinion of Mr. Justice FRANKFURTER in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 918, who wrote: "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

II. *Possible mootness.*

Following the mandate of the court below, proceedings against the respondent Stubbs have resumed in the Monroe County Court of New York. The district attorney has filed an information charging the respondent with being a second felony offender as a result of a 1953 *Texas* conviction for breaking and entering.[2] At the time of the writing of this brief the Monroe County Court has already determined that the respondent is the same person who was convicted in Texas. Yet to be determined is whether the Texas conviction was constitutionally obtained. The present controversy, arising from the use of the Tennessee conviction, may well become moot.

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[2] The applicable statute, former New York Penal Law, § 1941 subd. 1, permits a sentence for second *or* third felony offenders of double the maximum allowed for first offenders.

III. *No conflict with decisions of this Court; prior recorded testimony admitted in violation of confrontation clause.*

A. No effort to obtain presence of witness.

The first reason advanced by the petitioner for allowance of the writ of certiorari is that the decision below constitutes "a significant departure from the prior decisions of this Court" (petition, p. 3). The decision below, *United States* ex rel. *Stubbs* v. *Mancusi*, 442 F. 2d 561, meticulously applied the rules announced in *Barber* v. *Page*, 390 U. S. 719, in which the Court stated: "The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' 381 F. 2d, at 481. In short, a witness is not 'unavailable' for purposes to the foregoing exception of the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." (390 U. S. 719, 724-725)

The confrontation clause of the Sixth Amendment is very straightforward, providing: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him:".[3]

[3] At the time the Sixth Amendment was adopted mere absence from a jurisdiction justified no exception to the right of confrontation.

(Footnote continued on following page)

The petitioner seeks to distinguish *Barber* v. *Page*, 390 U. S. 719 from the present case, because the witness whose presence the Tennessee authorities did not attempt to seek, was in Sweden and not in a federal penitentiary 225 miles away in another state. In this era of jet travel there is no reason to draw such a brutal distinction between travel from Sweden and travel from Texas. The two California decisions cited on p. 9 of the present petition appear to have involved effort to obtain the witness. *Goldwasser* v. *Brown*, 417 F. 2d 1169 (D. C. Cir.) cert. den. 397 U. S. 922, the other cited by the petitioner, was not a criminal proceeding, and thus does not involve the confrontation clause of the Sixth Amendment.

B. Prior testimony unusable, as without effective cross-examination.

There is a second and independent reason why the Sixth and Fourteenth Amendments render invalid the respondent's Tennessee conviction. Even though a prosecution *has* made a good-faith effort to obtain the presence of a witness, it is not every prior statement of the witness that can be read into evidence. Only when the accused had an effective opportunity to cross-examine the witness at the time his testimony was recorded, can the testimony be used at a later trial. Cross-examination is an essential requirement.[4]

(Footnote continued from preceding page)
The exceptions were (1) death of the witness or (2) absence because of the defendant's connivance. *Regina* v. *Scaife* (1851) 17 Q. B. 238, 242, 244; 2 Den. C. C. 284, 285-286; 5 Cox C. C. 243, 245, 246; *Motes* v. *United States* (1900) 178 U. S. 458, 471-473; *Wilbur* v. *Seldon* (1826, N. Y. Sup. Ct.) 6 Cowen 165; *LeBaron* v. *Crombie* (1817) 14 Mass. 234, 235.

[4] See *Pettit* v. *Rhay*, 62 Wash. 2d 515, 383 P. 2d 889, 893 (cross-examination not permitted); *Pointer* v. *Texas*, 380 U. S. 400, 406-408 (earlier testimony recorded when accused was deprived of counsel); *Barber* v. *Page*, 390 U. S. 719, 722 (discussion of counsel being impeded by ethical considerations); *Peterson* v. *United States* (5th Cir.) 344 F. 2d 419, 421 (issues different when testimony recorded); *State* v. *Cumbo*, 9 Ariz. App. 253; 451 P. 2d 333, 336 (defendant involuntarily absent when testimony recorded).

The testimony read at the 1964 Tennessee trial of the respondent Stubbs had been given at his first trial, in 1954.[5] The court below held that the testimony of the witness had been taken when the respondent Stubbs was effectively deprived of his right to cross-examine the witness (442 F. 2d 561, 563-564). Assigned counsel at the 1954 Tennessee trial were compelled to go to trial without a sufficient time to prepare a defense. For the offenses which allegedly took place on June 11, 1954, the respondent Stubbs was indicted on July 8, 1954, was arraigned and was assigned counsel on July 9, and went to trial on July 12, 1954 over the objection of his counsel. The court below made a careful analysis of the cross-examination attempted of the witness at the first Tennessee trial in the light of the defenses raised, to conclude that the cross-examination of the witness in 1954 was ineffective (442 F. 2d 561, 564). (For further discussion of these factors, see part IV B, below.)

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[5] The Tennessee convictions were set aside in 1966 by the United States District Court for the Middle District of Tennessee, *Stubbs* v. *Bomar*, Civil Action No. 3585. Contrary to the suggestion made on p. 11 of the petition for certiorari there has been no "clear contravention" of this Court's holding in *Chambers* v. *Maroney*, 399 U. S. 42. A "full and complete" hearing was conducted by the District Court for the Middle District of Tennessee, which held: "The Court is of the opinion that the evidence and the record show that the Constitutional rights of petitioner Stubbs were violated at the time of his trial in the Criminal Court of Sullivan County in that his Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial, and as a result the petitioner was denied effective representation by counsel." This decision appears to have been accepted by the prosecuting authorities in Tennessee, who promptly awarded the respondent Stubbs a second trial. Certainly, the present proceeding is singularly inappropriate for attacking the setting aside in Tennessee of the 1954 conviction. See the discussion in part I, above.

IV. *Error not shown to be harmless.*

A. No conflict with decisions of other Courts of Appeals.

The petitioner has argued that the court below "in effect eliminated the harmless error rule except where a federal court finds that the trial jury could have reached no other conclusion but guilt—a more rigorous standard than is applied on direct appeal", an interpretation said to be in conflict with the law of four other circuits (petition, p. 14). The petitioner appears to misconstrue the doctrine of harmless error. The six cases cited to show a conflict among the circuits deal with what constitutes sufficient evidence to convict under various federal criminal statutes.[6] Indeed, holdings similar to those in the cases cited can be found in all of the circuits. The distinction between a harmless error issue and a sufficiency of evidence issue is strongly drawn in *Glasser* v. *United States*, 315 U. S. 60, which held as to sufficiency of evidence; "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (315 U. S. 60, 80); but which also held: "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of [his attorney as counsel for a codefendant] is at once difficult and unnecessary. The right to have the assistance of counsel is

[6] The only one of the cases cited, which even peripherally deals with harmless error, is *Bailey* v. *United States*, 410 F. 2d 1209 (10th Cir.) cert. den. 396 U. S. 933, arising from a prosecution for kidnapping and for transporting a victim in interstate commerce for sexual gratification. After discussing at length the sufficiency of the evidence, particularly as against one of defendants, the court then disposed in summary fashion of an argument about the introduction of photographs, holding nothing about them to be inflammatory and that, "If there was a lack of proper foundation for admission, the error did not affect substantial rights of the accused and was harmless." (410 F. 2d 1209, 1217).

too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (315 U. S. 60, 75-76).

The court below was fully in accord with this Court's decisions on the harmless error rule. See *Chapman* v. *California*, 386 U. S. 18, in which it was held: "There is little, if any, difference between our statement in *Fahy* v. *Connecticut* [375 U. S. 85, 86-87] about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (386 U. S. 18, 24).

B. Prejudicial effect of using the prior testimony.

Whether constitutional error can be excused because harmless, is in essence a factual inquiry. A careful weighing of the evidence was made by the court below (442 F. 2d 561, 564). This Court may not wish to grant certiorari to reexamine the evidence, especially since the records from the State of Tennessee are not part of the certified record in this cause (see part I, above).

The conviction of the respondent Stubbs, was for the murder of a Mrs. Holm (and connected crimes). Although there were a number of witnesses called at the 1964 Tennessee trial, not one of them, save the defendant himself, had observed the homicide and the events leading to it. Mr. Holm, the husband of the deceased, *had* observed the events and had given testimony at the 1954 trial. Over the vigor-

ous objection of Mr. Stubbs' counsel at the 1964 trial (159-164, 173, 174[7]), the testimony of Mr. Holm was read. His testimony was that Mr. Stubbs, who was armed with a pistol (184), forced his way into the Holms' car (186); after driving the car for a while, Mr. Stubbs suddenly shot both Mr. Holm (194) and Mrs. Holm (196-200). Mr. Holm did not testify to any provocation or activity on the part of his wife or himself before Mr. Stubbs started shooting; "When he started shooting, I jumped up and grabbed the gun. Of course, I was too late. He already shot her, but there was one shot fired after that. It went up in the top of the car" (197). While Mrs. Holm was slumping over, Mr. Holm struggled with Mr. Stubbs, got the pistol away from him, and started hammering away with it at Mr. Stubbs' head (200). Later Mr. Stubbs was brought by the police to Mr. Holm's hospital room for identification (206).

The respondent Stubbs' testimony was that he had forced himself upon the Holms at gun point because he was driven by desperation and hunger (242-248). But after he had explained his motivation (249), the Holms made him welcome, Mrs. Holms even suggesting that he put the gun down so that he wouldn't get into trouble going through a town (250). He did this; they passed a policeman with no outcry by the Holms (251). Mr. Stubbs' understanding with the Holms was that when they reached Bristol, Tennessee, he would get out and they would continue on their way (253). Something suddenly happened to alter his perception, "I felt a sharp pain that seem' [sic] to start in my head and go all the way down through me and I reached up with both hands and I heard this loud roar, bang . . . . Stuff started running down my face and down my shirt and

[7] These numbers in the parentheses and those to follow refer to pages of the transcript of the 1964 Sullivan County, Tennessee trial, No. 34449X.

all that I could think of that he has got the gun. Q What did you do? A I just went outside through the car door." (254)

None of the other witnesses saw anything of the homicide or knew anything of the developing relationship between Stubbs and the Holms. Accordingly, any error introducing the prior recorded testimony of Mr. Stubbs was far from being harmless. Mr. Holm's testimony was vital to the conviction.

Even if a brilliant and searching cross-examination of the witness Holm had been conducted in 1954, the impact of Holm's testimony, as the only eye witness to the alleged crime, would have made the error of admitting the testimony at Stubbs' second trial the diametric opposite of harmless.

The prejudice is accentuated, however, by the failure of Stubbs' 1954 counsel (who had been rushed to trial) to make anything but a cursory cross-examination (207-217). There was no examination of Mr. Holm exploring precisely what happened at the shooting, no attempt to establish that the Holms had made Stubbs a guest after his initial criminal incursion. Well founded is the conclusion of the court below, "we cannot declare the absence of any examination of Holm—the only eye-witness to the alleged crime—on this point to be harmless beyond a reasonable doubt" (442 F. 2d 561, 564).

CONCLUSION

Because the records leading to the respondent's 1964 Tennessee conviction now under attack were not introduced into evidence below, because the Tennessee authorities responsible for the conviction have not been heard in the present proceeding, because important stages leading to

the respondent's convictions took place before the controlling decision of this Court was handed down,—the present record is not clear, specific and full. The prosecuting authorities of New York appear to have found a Texas conviction of the respondent, which can be used as a predicate felony for increased punishment. The present proceedings attacking a predicate Tennessee conviction may well become moot.

The decision below is not in conflict with decisions of this Court or with those of other courts. Because the prosecution in Tennessee made no effort to obtain the presence of a witness, the use of prior recorded testimony of the witness at trial deprived the respondent of rights under the Sixth and Fourteenth Amendments. Even if the prosecution in Tennessee had made such a good-faith effort, the prior testimony should not have been used, because the testimony was taken without an effective opportunity for cross-examination. The transcript of the second Tennessee trial clearly demonstrates that the error of using the prior testimony was highly prejudicial; the error most certainly was not harmless beyond a reasonable doubt.

For these reasons, as well as the essentially factual nature of the inquiry below, this Court should deny the petition for certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM C. STUBBS, *Respondent,*

By his attorney,
BRUCE K. CARPENTER.

Dunkirk, New York
November 8, 1971.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
FEB 23 1972
E. ROBERT SEAVER, CLERK

No. 71-237

VINCENT R. MANCUSI, Warden of
Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-237

VINCENT R. MANCUSI, Warden of
Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

BRIEF FOR PETITIONER

Opinions and Orders Below

The orders of the United States Court of Appeals denying the petition for rehearing and rehearing *in banc* are reproduced as Appendix A and Appendix B to the petition for writ of certiorari in the within case. The opinion of the United States Court of Appeals for the Second Circuit is reported at 442 F. 2d 561 and appears in the Appendix at p. 23. The opinion of the United States District Court for the Western District of New York is not reported and is appended to the petition as Appendix D.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 19, 1971 reversing the denial of

respondent's petition for a writ of habeas corpus by the United States District Court for the Western District of New York. A petition for rehearing or rehearing *in banc* was denied by the Court of Appeals on May 19, 1971. The petition for certiorari was filed on August 16, 1971. Certiorari was granted on January 10, 1972.

Questions Presented

1. Whether the rule requiring due diligence in obtaining the presence of an absent witness is met when it is established that a 72-year-old witness is a permanent resident of a foreign country, 4000 miles from the situs of the trial in question?

2. Whether respondent's right of confrontation was violated at his second trial for murder by the introduction of the prior recorded testimony of an unavailable witness, where that testimony had been subject to cross-examination by competent counsel at respondent's first trial but the trial had later been vacated because counsel had been tardily appointed?

3. Whether the introduction of prior recorded testimony at respondent's second trial was harmless beyond a reasonable doubt, where respondent himself testified at the retrial that he had forced the murder victim and her husband into a car at gunpoint and compelled them to drive to the spot where the shooting occurred?

4. Whether the claimed trial errors were prejudicial because counsel at respondent's first trial did not cross-examine a witness on whether the stranger who kidnapped him at gunpoint later became his guest?

Statement

A

Respondent was convicted in Monroe County, New York in 1966 for assault in the first degree and possession of a firearm. On October 7, 1966 he was sentenced as a second offender to a term of 19-20 years on the assault charge, and 13-14 years on the firearms charge, the sentences to run consecutively.

On June 24, 1968 the Appellate Division, Fourth Department affirmed the conviction without opinion (30 A.D. 2d 777) and reargument was denied on September 19, 1968 (30 A.D. 2d 932). Leave to appeal was subsequently denied by the New York Court of Appeals. On February 24, 1969, this Court denied certiorari. (393 U.S. 1108).

The increased punishment imposed upon respondent by the Monroe County Court was predicated upon a 1964 Tennessee conviction upon retrial for first degree murder committed on June 11, 1954. Respondent had originally been convicted of the same murder charge in July 1954; however, the original conviction had been reversed by the United States District Court for the Middle District of Tennessee on January 6, 1964 in a habeas corpus proceeding on the grounds of tardy appointment of counsel. *Stubbs* v. *Bomar* (Civil Action 3585, M.D. Tenn.).

B

The crime of which appellant Stubbs was convicted in Tennessee was the murder of Mrs. Alex Holm on June 11, 1954. At the 1964 retrial, Burl A. Holm* testified that his parents, Alex and Ruby Holm were driving their car from their home in Texas through Tennessee; their destination was Providence, Rhode Island, and from that point, they

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* Spelled Holmes in the trial transcript.

were to fly to Sweden (Tr. 59).* He stated that his father now resided in Ekskogen, Sweden (Tr. 59).

Stubbs testified that he had been discharged from Texas State Penitentiary in June 1954 (75a)** and that he was without money and was hitchhiking through the South (76a). He had been given a gun (76a) by a friend who had been a fellow inmate in prison (93a) and had this gun in his possesison when he met Mr. and Mrs. Holm (81a). After their refusal to give him a lift (81a), he forced them at gunpoint to get into the back seat of their car (81a, 96a). With the gun in his hand at intervals pointing into Mrs. Holm's face (97a) or on the front seat (97a), Stubbs drove the car through Rogersville, Kingsport and Blountville, Tennessee (83a, 84a). Stubbs testified that near Bristol, Tennessee (85a):

> "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in a clear focus, but in a reddish haze. I mean there was no pain or nothing . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and heard this loud roar, bang . . . Stuff started down my face and down my shirt and all that I could think of is that he has got the gun . . . I just went outside through the car door [onto the highway]."

After that, Stubbs ran away to the woods, "everything went black" and he awoke after sundown (86a). A

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* References to pages in the transcript of respondent's 1964 Tennessee trial, which is part of the record before this Court, will be prefaced Tr.

** Stubbs' 1964 testimony is reproduced in its entirety in the appendix, and page references to the appendix will be followed by "a".

passing driver, Mr. Bernie Webb* gave him a lift (87a) and they were stopped at a roadblock (87a). Mr. Webb suggested to officers at the roadblock that Stubbs be investigated (88a). He was taken to Bristol Jail in handcuffs (88a), then escorted within an hour to the hospital where several head wounds were treated (88a).

Stubbs went on to state that he was taken to Mr. Holm's room in the hospital and that a man (whom he did not recognize as Holm at the time) pointed to him and said: "[T]hat is the one" (89a). He denied knowledge that Mrs. Holm was dead, claiming that he was hit on the head and that he did not shoot Mrs. Holm (89a, 99a).

Captain Frank Williamson of the Tennessee Highway Patrol testified that on June 11, 1954 he received information about a wrecked car near Blountville. He went to the scene and found an old model Ford with blood inside and the door open (Tr. 22). A woman had been shot and a man injured (Tr. 23).

Sergeant Seahorn of the Tennessee Highway Patrol testified that after the shooting they were checking cars at a highway roadblock and that when Mr. Webb and respondent Stubbs drove up, Stubbs was arrested (Tr. 78). Sergeant Seahorn told Stubbs that he was under arrest in connection with a murder (Tr. 82). At the time, respondent had blood on the front of his shirt and his clothes were torn. He explained this blood by saying that he had been fishing and had fallen off a rock cliff (Tr. 79). He was searched, and an empty bullet shell and knife were found (Tr. 80). Sergeant Seahorn further testified that Stubbs was taken to City Jail and then to the hospital room of Alex Holm, where (in the presence of several other police officers) Holm pointed at Stubbs and identified him (Tr. 80).

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* Mr. Webb testified that he had picked Stubbs up on the highway, that his shirt was bloody and that they were stopped by the roadblock (Tr. 63-73).

Their testimony was corroborated by Captain Williamson (Tr. 26, 30) and Sergeant H. P. Montgomery of the Tennessee Highway Patrol (Tr. 86-89). Sergeant Montgomery further said that at the time that Holm identified Stubbs, there was ample light in the room (Tr. 94).

Dr. Franklin Buchanan, who attended Alex Holm in the Emergency Room of Memorial Hospital, testified that two bullets had entered Mr. Holm's face, one lodging in the neck, and the other in the nasal passage; both bullets were removed (Tr. 133-134). Despite this injury and the discomfort, Mr. Holm's faculties were intact and his eyes were good; he had brought his glasses with him to the hospital (Tr. 134-135). He identified Stubbs as his assailant (Tr. 135). Dr. Charles Harkrader, Jr., testified to the same effect as to Holm's conscious and rational state (Tr. 139).

The testimony of Alex Holm, given at Stubbs' 19[illegible] trial, was read into the transcript at the 1964 trial, over counsel's objections; Mr. Holm had in the meantime become a permanent resident of Sweden (Tr. 59). Holm had identified Stubbs in court (43a)* and had testified that Stubbs had forced him and his wife into their car at gunpoint and threatened to kill them (44a). Stubbs drove the car, keeping his gun in his left hand pointed towards them at all times (45a). Mr. and Mrs. Holm were carrying $1,400.00 in traveler's checks and cash (47a). No friendly relations developed between them (104a). Stubbs began shooting when they were slightly east of Blountville (50a), twice at Holm and once at Mrs. Holm (52a). Holm seized the gun after Stubbs had begun to shoot (52a), another shot went off (52a), and Holm hit Stubbs on the head with the gun 3 or 4 times (55a). Mrs. Holm's body slumped over (55a) and Stubbs got out of the car and ran away (55a).

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* Holm's testimony as read into the 1964 transcript is reproduced in its entirety in the Appendix, and page references to the Appendix will be followed by "a".

C

Respondent commenced the instant proceeding in the Western District of New York by means of a petition for a writ of habeas corpus. His petition contained ten claims, nine of them directed toward his Monroe County trial and conviction. Respondent's tenth claim was that the 1964 Tennessee conviction was unconstitutionally obtained and as such should not have been made the basis for increased punishment (3a). Respondent alleged that the 1964 Tennessee conviction had been obtained in violation of his Sixth Amendment right of confrontation.

After having examined the record on appeal in the New York Courts, the District Court on June 30, 1969, denied all of respondent's claims on the merits (see Appendix D, petition for writ of certiorari). On October 7, 1969 the Court of Appeals for the Second Circuit granted respondent a certificate of probable cause, leave to appeal *in forma pauperis* and assignment of counsel. The Court limited the issue on appeal to the constitutionality of the 1964 Tennessee conviction (22a).

On April 19, 1971, the Court below rendered its decision, reversing the decision of the United States District Court. The Court held that respondent had been deprived of his right of confrontation at the Tennessee retrial for murder, because the testimony of a witness proven to be residing in Sweden was read into the record, and because counsel at the first trial had been tardily appointed and had not attempted to establish by cross-examination that after Stubbs had kidnapped the Holms at gunpoint, they had made him welcome as a "guest." This absence of questioning on the "guest" theory could not be harmless error (28a).

The dissenting judge, Hon. Leonard P. Moore, terming the majority decision "an extraordinary example of 'justice' dispensed by the federal courts" (29a), pointed out that Stubbs had kidnapped Mr. and Mrs. Holm at gunpoint

and forced them to accompany him in their car to the spot on the road where the shooting occurred. Holm had testified in 1954 as to the kidnapping, the murder of his wife, and his own wounding. Judge Moore found that Stubbs' arguments about lack of confrontation were "a smoke-screen" (31a), since counsel cross-examined Holm and the issues and facts were not complex. He further noted that Stubbs was not seeking relief from his Tennessee conviction as such but simply from its use as a predicate for a longer sentence* (31a).

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*In his brief in opposition to the petition for writ of certiorari, respondent suggested that the case at bar was moot because he was to be resentenced as a second felony offender in the Monroe County Court, on the basis of a 1953 Texas conviction. This contention is easily rebutted by established case law and the Penal Law of New York. This Court held in *Sibron* v. *New York*, 392 U.S. 40, 55 (1968) that even where a sentence is already served, the issue cannot be viewed as moot because collateral disabilities and the possibility of a higher penalty upon subsequent conviction are involved. See *United States* v. *Morgan*, 346 U.S. 502, 512 (1958); *Pollard* v. *United States*, 352 U.S. 354 (1957). Under New York Law, the Tennessee conviction is of particular significance not only for impeachment purposes but also in relation to the sentence in any subsequent conviction. § 70.10 of the Penal Law (McKinney's 1967) provides for discretionary sentences of fifteen years to life imprisonment for persistent felony offenders—the same sentence authorized for a Class A felony under § 70.00-2(a). Among the factors which the court is required to consider in exercising its discretion are 1) the history and character of the defendant 2) the nature and circumstances of his criminal conduct. Since the Tennessee conviction involved a brutal murder committed only seven days after release from the Texas penitentiary, it would be central in the sentencing court's assessment of the period needed for rehabilitation and for protection of the public interest.

POINT I

Barber v. _Page_, 390 U.S. 719 (1968), which concerned reading of preliminary hearing testimony of a witness imprisoned in another state, was not violated by use of prior testimony of a witness permanently domiciled on a foreign continent.

The court below, in an erroneous application of this Court's decision in *Barber* v. *Page*, 390 U.S. 719 (1968), held that the prior recorded testimony of an elderly witness of Swedish nationality who had permanently returned to Sweden, could not be used at respondent Stubbs' Tennessee retrial for first degree murder. It was held that due diligence had not been exercised to obtain the presence of the witness. This holding would invalidate the Tennessee conviction and preclude its use as a predicate for finding respondent a second felony offender after conviction in Monroe County, New York, of first degree assault and possession of a firearm.

The ruling in *Barber* was that a good-faith effort should have been made to have the witness present. At Stubbs' 1964 retrial, the prosecution ascertained the location of the missing witness and introduced evidence as to his whereabouts (Tr. 59). As further verification, a subpoena was also directed to his former residence in Texas (Tr. 39, 118). In the context of a witness who is domiciled outside the jurisdictional reach of the states, the Federal government and the territories of the United States, these prosecution efforts satisfy the good faith requirement. As the Supreme Court of Tennessee observed in affirming Stubbs' conviction (*Stubbs* v. *State*, 216 Tenn. 567, 393 S.W. 2d 150, 154):

> "The Uniform Law to Secure Attendance of Witnesses, T.C.A. § 40-2429 et seq., is limited to apply to any state, territory of the United States or District of Columbia. The Criminal Court of Sullivan County, who tried Stubbs, had no effective or compulsory process in Ekskogen, Sweden."

By contrast, *Barber* involved the reading of preliminary hearing testimony of a witness who was at that time in a federal prison 225 miles from the trial court. This Court noted that increased cooperation between the Federal government and the States had factually undercut the theory that the process of a trial court could not go beyond State borders. It is clear that the decision concerned a situation in which it was legally and physically possible to produce the absent witness. Indeed, this Court observed that in the case of prospective witnesses in federal custody, federal courts had the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutors, and that the United States Bureau of Prisons permitted federal prisoners to testify in state court criminal proceedings pursuant to issuance of such writs by state courts. This Court then referred to the duty of requesting "an exercise of discretion on the part of federal authorities" (390 U.S. at 724), *not* of making a request to the witness.

Several recent decisions demonstrate that proof that a witness is living on a foreign continent at the time of trial is sufficient to establish unavailability. The Fifth Circuit ruled on this question in *United States* v. *Mobley*, 421 F. 2d 345, 351 (1970), where the earlier testimony of a witness was used in defendant's retrial for robbery, theft, assault and murder. The witness refused to testify at the retrial, because of a mistaken interpretation of the Fifth Amendment. The court, after a discussion of *Barber*, held that the witness was

> "no less unavailable than [witnesses in cases involving] death or *absence from the country* or physical inability to speak." (emphasis added)

And in *People* v. *Benjamin*, 83 Cal. Rptr. 764 (Ct. of App. 1970), defendant claimed at his trial for robbery in the second degree, that the introduction of preliminary hearing testimony of a missing witness violated his right

of confrontation. The prosecution showed that it had been advised by a legal officer of the Marine Corps that the missing witness was on military duty in Vietnam and would be unavailable for trial. On the basis of this evidence, the Court of Appeals upheld the trial judge's finding that the witness was unavailable as a matter of law. Accordingly, the admission of the witness' pre-trial testimony was found to be proper.

The unavailable witness in *People* v. *Ashford*, 71 Cal. Rptr. 619 (Ct. of App. 1968), had testified against defendant in a retrial for robbery in the second degree, and been cross-examined at a preliminary hearing and a prior trial. At the time of defendant's second trial, the missing witness was at a convention in Florida, and was thereafter planning to travel in the Caribbean and in the western United States. While the court noted that the better practice would have been to adjourn the second trial until the witness returned to California, it upheld defendant's conviction on the ground that he was not deprived of his full Sixth Amendment right of confrontation, but only the opportunity to have the trier of fact observe the witness' demeanor while being subjected to interrogation.

In *Goldwasser* v. *Brown*, 417 F. 2d 1169 (D.C. Cir. 1969), a former English teacher sought review of a proceeding in which he was discharged from civilian service with the Air Force for having made unauthorized statements to his students. The students were foreign military officers who had subsequently returned to their native countries at the time the disciplinary hearing took place. Notwithstanding plaintiff's argument that the hearing was defective because these witnesses should have been produced by the Air Force upon his request, the court stated that plaintiff's access to these witnesses prior to their departure from the United States prevented plaintiff from claiming unfairness at the hearing amounting to a violation of the Constitution. The Court noted that the Civil Service Commission did not have subpoena power to compel the attendance of witnesses, and

further noted that these foreign students were not under the control of the Air Force.

Cases which have found that due diligence had not been exercised to obtain the presence of an absent witness, have involved situations where the witness might have been in the jurisdiction (*Holman* v. *Washington*, 364 F. 2d 618 [5th Cir. 1966]; *Wilson* v. *Bowie*, 408 F. 2d 1105 [9th Cir. 1969]; and *Government of Virgin Islands* v. *Aquino*, 378 F. 2d 540, 551 [3rd Cir. 1967]). In *Aquino*, for example, the witness was a stewardess on a Norweigian freighter. The court there held:

> "So far as the record shows, therefore, the complainant might have been residing continuously in the Virgin Islands ever since the preliminary hearing was held. She might have been aboard a vessel which was in St. Thomas at the time of trial. *In these circumstances* it cannot be said that the prosecution satisfactorily established the burden which rested on it to show that she was *unavailable* at the time of trial." (emphasis added)

In the instant case, a sufficient showing of Holm's unavailability was made, in view of the more than 4,000 mile distance between Ekskogen, Sweden and the place of trial, and the witness' immunity from any form of process, intra or interstate.

The court below stated that it did not wish to "broaden the exception to the confrontation clause" relating to unavailable witnesses (27a). However, the Second Circuit's decision has *extended* the application of *Barber* to witnesses domiciled abroad, in relation to a trial occurring even before *Pointer* v. *Texas*, 380 U.S. 400 (1965)* in which (as shown below) no conceivable prejudice resulted from the use of the disputed testimony.

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* This Court stated in *Berger* v. *California*, 393 U.S. 314 (1968), that *Pointer* v. *Texas* foreshadowed the decision in *Barber*.

POINT II

Even assuming *arguendo* that due diligence requires a request to be sent to a witness domiciled on a foreign continent before his prior recorded testimony is admitted into evidence, the error in the case at bar would have been harmless.

Even assuming *arguendo* that the good faith efforts made by Tennessee at Stubbs' retrial were insufficient and that the rule of due diligence requires a request to be sent to a witness* permanently residing on a foreign continent, the error of reading the prior recorded testimony into the record at the retrial would have been harmless.

Analysis demonstrates that the outcome of the 1964 trial would beyond a reasonable doubt have been the same, whether the State had communicated with Mr. Holm or not. If a letter had been sent to the witness and he had refused to come to Tennessee, his prior testimony would have been read into the record at the second trial. If on the other hand he had agreed to undertake the trip despite his advanced age, it is wholly implausible to hypothesize that he would have testified differently as to the kidnapping and shooting of his wife and his own injuries especially since Stubbs' identity, the ownership of the gun, and the fact of the kidnapping were corroborated by Stubbs himself (81a, 96a).

It should be noted that respondent Stubbs took the stand at both trials, once when Mr. Holm testified in person and the second time when the testimony was read into the record. Counsel in 1954 and 1964 adopted this strategy. Thus, it is apparent that Stubbs would have testified in 1964 whether due diligence had resulted in Holm's appear-

* As previously noted, this Court in *Barber* referred solely to a request to "federal authorities," as did Judge Aldrich of the Tenth Circuit, who had dissented in *Barber* below. (381 F. 2d 479, 481 [1967]).

ance—which would have made Stubbs' testimony more imperative—or (as actually happened) in the reading of his prior testimony.

The court below set forth only one way in which the trial should have been handled differently by counsel—cross-examination of Holm as to whether Stubbs had "gained [the Holms'] sympathy during the course of the trip and in effect became their guest" (28a). This theory has no relation to respondent's due diligence claim. Even if Holm had returned to Tennessee, counsel at the 1964 trial did not indicate (contrary to the intimation in the decision below at 28a) that they would have questioned Holm about any increased amicability on his part or his wife's toward their kidnapper. The questions listed by them related to other matters (73a-74a).

Moreover, the "guest" theory is wholly refuted by the record. The reason why counsel in 1954 did not pursue this line of questioning is plain from Holm's testimony. Stubbs had stated that when he had his gun pointed at Mrs. Holm's face, she suggested that he keep it out of sight (97a), and that the Holms had promised to give him no trouble (84a). In order to dispel any intimation that the Holms had changed their attitude towards him, Mr. Holm was put on the stand in rebuttal and asked the following:

> "Mr. Holm, from the time that you left the roadside park until this occurrence near Blountville, was the relationship friendly between you and your wife and the defendant Stubbs or were you and Mrs. Holm afraid of him?" (104a)

He answered:

> "No, Sir, there was no friendly relations."*

* It is significant that 1964 defense counsel Mr. Haynes, far from indicating that he would have asked such a question, objected to this question and answer being admitted into evidence (104a).

This statement is corroborated by Stubbs' own testimony that he was hit on the head as they drove along (85a, 95a). It would therefore have been clearly inadvisable to elicit from Holm more testimony which would have undercut the defense theory still further, and fixed Holm's words in the jury's mind even more firmly.*

The court below rejected the application of harmless error in this case on the erroneous assumption that Holm was "not questioned" (28a) concerning the "guest" theory, which it characterized as having "some plausibility" (28a). In ruling that the 1964 record was insufficient to sustain the Tennessee conviction because an allegedly reasonable hypothesis as to the shooting might be conceived, the reasoning of the Second Circuit suggests an analogy to the rule that evidence is insufficient unless all reasonable hypotheses except guilt are excluded. See e.g. *Battles* v. *United States*, 388 F. 2d 799, 801-2, n. 3 and 5 (5th Cir. 1968).

However, four other circuits have held unequivocally that it is not necessary to preclude every plausible theory except guilt in order to uphold a conviction. *United States* v. *Boyle*, 402 F. 2d 757 (3rd Cir. 1968), *cert. denied* 394; *United States* v. *Chappell*, 353 F. 2d 83 (4th Cir. 1965); *United States* v. *Luxemberg*, 374 F. 2d 241 (6th Cir. 1967);

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*Trial practitioners avoid continuation of cross-examination under circumstances such as these. See "Preparation and Trial," by John Alan Appleman (1967 ed.), Chapter VIII, "Principles of Cross-Examination," Section 12: "Contrary to lay beliefs, a witness who knows what he is talking about and who testifies to the strict truth is not vulnerable to cross-examination. In the first place, most advocates are pretty conscientious men dedicated to the quest of justice. Even if it were possible to shake the testimony of such a person in some minor respect, or to embarrass him upon the stand, they would not feel that their duty to a client required a betrayal of their oaths as officers of the court. . . . But even those counsel who did not maintain a like standard of principles would find such a witness well able to handle himself, and a cross-examination under those circumstances would merely reiterate the testimony and create a greater impact upon the jury."

Bailey v. *United States*, 410 F. 2d 1209 (10th Cir. 1969), *cert. denied sub nom. Freeman* v. *United States*, 396 U.S. 933; *Early* v. *United States*, 394 F. 2d 117 (10th Cir. 1968), *cert. denied* 393 U.S. 1003; *Golubin* v. *United States*, 393 F. 2d 590 (10th Cir. 1968), *cert. denied* 393 U.S. 831. Indeed, the Second Circuit has rejected the *Battles* rule for federal criminal convictions (*United States* v. *Grunberger*, 431 F. 2d 1062) and thus the creation of such stringent requirements for cross-examinations in state court trials is unwarranted.

To rule that the claimed error at respondent's 1964 trial was not harmless because of the "guest" hypothesis, reduces to a nullity this Court's rationale in *Harrington* v. *California*, 395 U.S. 250 (1968). The failure to cross-examine as to a theory without any credible support in the record is not an error, cannot support a claim of error, and has no likelihood of having changed the outcome of respondent's trial.

POINT III

Since the tardy appointment of counsel at respondent Stubbs' first trial did not in fact deprive respondent of effective assistance of counsel, no Sixth Amendment right was violated by reading testimony recorded at this trial into respondent's retrial.

Respondent Stubbs' second trial for murder in Tennessee was necessitated because the United States District Court for the Middle District of Tennessee vacated Stubbs' first conviction, solely on the ground that counsel was tardily appointed.* Respondent erroneously concludes from this circumstance that even if due diligence were not in question, Holm's testimony would still have been inadmissible in 1964 because the right of confrontation was not orig-

* *Stubbs* v. *Bomar*, Civil Action, 3585 (M.D. Tenn., Filed Jan. 6, 1964).

inally satisfied. However, as was conceded by the Second Circuit in the case at bar, the Tennessee District Court decision in itself "would not establish the ineffectiveness of the cross-examination of Holm . . ." (28a).

Chambers v. *Maroney*, 399 U.S. 42 (1970) set out the applicable standard for determining whether tardy appointment of counsel has resulted in depriving a defendant of his right of confrontation. Such late appointment does not *per se* require reversal of every conviction, nor an evidentiary hearing to determine whether the right to counsel has been violated. It must be shown that prejudice to the defendant in fact resulted.

This Court noted in *Chambers* that there was no charge that counsel was "incompetent or inexperienced" (399 U.S. at 53). Nor has such a charge been made as to respondent Stubbs' first trial counsel. Respondent was represented by three attorneys, and the recorded testimony of Holm read in its entirety into the 1964 trial transcript (37a *et seq.*) demonstrates that the questioning of the complaining witness was capably handled.

Mr. McInturff and Mr. Taylor, who were among the three counsel in 1954, made numerous objections during the course of the direct examination of Mr. Holm. They objected to leading questions (41a, 46a, 47a); to physical descriptions of exhibits which might prejudice the jury (51a); to introduction of allegedly immaterial testimony calculated to build up sympathy for Holm (38a); to questions asked without proper foundation ("Wait a minute, there has been no statement that she said that") (49a); and to exhibits improperly offered into evidence ("We except to that unless it is shown that the conditions as portrayed in that picture existed on this day of June 10 or 11") (66a).

On cross-examination, counsel attempted to show that respondent had no intention of killing anyone. Mr. Taylor questioned Holm closely—"Now, at that time there was

nothing to have prevented him from killing you or killing your wife, if he had wanted to . . .?" (61a, 62a). Counsel also attempted to show that respondent's only motive was to get a ride, not burglary ("At no time on this trip did he make any demand for your money?") (63a); ("In fact, he told you and your wife both that all he wanted was a ride to Bristol . . .?") (64a).

That Holm did not change his story pursuant to these questions results not from any defect in the inquiries, but from the fact that Holm was a strong witness, bereaved and himself injured, with no motive to lie. No amount of preparation on counsel's part, such as research on Holm's past life, would have weakened this direct and uncomplicated testimony. Holm was, as Stubbs himself testified (80a), the victim of a coincidental meeting with Stubbs at a roadside picnic table.

It is also significant that the statements of respondent's later attorneys at the retrial as to how they would have handled the first trial on cross-examination (73a-74a) do not point up any significant errors in technique or strategy. Indeed, they adopted many of the 1954 objections which had been sustained (49a, 50a, 52a, 56a). Most of the suggestions offered by the later counsel involved merely trivial points, except that counsel would have asked Mr. Holm whether he was the beneficiary of his wife's life insurance. However, as a matter of trial strategy, counsel at the 1954 trial apparently felt that this would antagonize the jury. Mr. Holm had himself been shot twice in the face, and such an insult to him would only have emphasized his tragic situation.

While the court below did not suggest that Mr. Holm should have been asked about his wife's insurance, it found that the cross-examination was fatally defective because counsel had failed to question Mr. Holm as to whether the kidnapper had been made "welcome" at the end of their journey (28a). However, as previously

shown, Holm had testified that there were no friendly relations with Stubbs (104a); thus, exploration of this subject by defense counsel would also have been rejected on strategic grounds.

The standard by which the performance of counsel is to be assessed should not be one which requires minute inquiry into what counsel has done, or one which presumptively invalidates the performance of counsel. Representation should not be held inadequate unless it is "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it." *Williams* v. *Beto*, 354 F. 2d 698 (5th Cir. 1965); *Diggs* v. *Welch*, 148 F. 2d 667, 670 (D.C. Cir. 1945), *cert. denied* 325 U.S. 889.

Nothing in this Court's opinion in *Chambers* altered this standard, or created any presumption that counsel was ineffective because he was tardily appointed. Such a presumption would magnify claimed errors or disagreements with the judgment of counsel into constitutional defects simply by attributing them to lack of time to prepare. Indeed, precisely such a confusion in analysis occurred in the case at bar, where the Second Circuit apparently attempted to connect the absence of cross-examination on the "guest" theory to tardy appointment of competent counsel, even though questions as to whether the Holms had welcomed Stubbs would have needed no advance research time.

Respondent Stubbs' 1954 trial preserved not only the opportunity to cross-examine, but also all the other aspects of the right of confrontation. Stubbs and his counsel confronted Holm personally to test his recollection, to sift his conscience, to compel him to stand face to face with the jury so that his demeanor could be observed, and to compel him to testify under oath with knowledge of the penalties for perjury. See *California* v. *Green*, 399 U.S.

149 (1970). It is clear that the purpose of the Confrontation clause—"to advance a practical concern for the accuracy of the truth determining process"—(*Dutton* v. *Evans*, 400 U.S. 74 [1970]) was wholly fulfilled.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, February 23, 1972.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1971
No. 71-237

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Petitioner,

vs.

WILLIAM C. STUBBS,

Respondent,

On Writ of Certiorari to the United States Court of Appeals, for the Second Circuit

BRIEF OF THE DISTRICT ATTORNEY OF MONROE COUNTY, NEW YORK, AS AMICUS CURIAE

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BRIEF OF THE DISTRICT ATTORNEY OF MONROE COUNTY, NEW YORK, AS AMICUS CURIAE

By consent of the petitioner and respondent herein, the District Attorney of Monroe County, New York, files this brief as *amicus curiae.*

Interest of the *amicus curiae*

Respondent herein, petitioner-appellant below, was convicted in Monroe County, New York, and sentenced by that County's Court. The decision and order below directly affect the sentence imposed.

POINT I

Imposing a Federal "hearsay rule" on the States is unnecessary in view of the due process clause, and is burdensome to the State Courts.

We believe this case presents issues far beyond our specific interest, and far beyond the specific interest of respondent.

The facts are set out in the brief of petitioner in chief, and in the majority opinion below (442 F. 2d at 562).

In *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065 (1965), this Court specifically made the Sixth Amendment's "right to confrontation" obligatory on the States through the Fourteenth Amendment.

Such rule if strictly and technically applied hampers the States both in individual prosecutions, and in formulating procedural rules to cope with the changing times and conditions.

We respectfully ask the Court to review the holding in *Pointer,* and to restore the "due process" rule as controlling in matters of trial evidence.

The right to confront witnesses is a Constitutional safeguard against anonymous accusers; it is not and should not be co-extensive with the right to have the witness present in the courtroom.

Respondent Stubbs was tried and convicted in Tennessee. His appeal, including the issue of the transcript's introduction, was heard by Tennessee's highest court. They affirmed unanimously. *State v. Stubbs,* 216 Tenn. 567, 393 S.W.2d 150 (1965).

Nevertheless, the majority below concluded that Stubbs had not had a fair trial because the witness Holm was not present in court at the second trial, and therefore Stubbs had not been confronted by the witnesses against him. This in face of the fact that Mr. Holm was present at the first trial and was fully cross examined by Stubb's counsel there.

In relying on *Barber v. Page* 390 U.S. 719, 88 S. Ct. 1318 (1968), the majority below pointed out that the Tennessee prosecutor had made no effort to induce Holm to voluntarily return to Tennessee, and therefore the transcript was improperly read into evidence. The facts in *Barber* are easily distinguishable from the present case. Not only was the witness then in prison only a few hundred miles away, easily available to judicial process, but the witness had never been effectively cross-examined.

Were this case being decided on a "due-process" theory, then there would be a narrow issue to decide: how hard does a prosecutor have to chase a witness who has left the United States before he can use the prior testimony of this witness. At the very least, more weight should have been given the Tennessee decision.

However, since *Pointer,* due process takes a back-seat to confrontation. Since each State is now bound to the Federal definition of confrontation, all the local rules of evidence, and all the judicial decisions dealing with hearsay in the State Courts are valueless in a Federal habeas corpus hearing.

Federal Courts are not bound by State Court interpretations of Constitutional questions. *Brown v. Allen;* 344 U.S. 443, 73 S. Ct. 397 (1953); *Fay v. Noia,* 372 U.S. 391, 83 S. Ct.

822 (1963). Therefore, anyone convicted at a trial where there was even a question of hearsay testimony is entitled to a hearing in a Federal Court after he exhausts his appeals in the State Courts based on *Pointer*. Our major concern is not with the court congestion and loss of judicial time these hearings may cause. Our worry is that controlling law in these hearings will be Federal case law, used to determine validity of State trials.

We understand that by necessity, this Court must, from time to time, establish new precedent, or break new ground. When such decisions are episodic and deal with either procedural or substantive rights, then there is a temporary dislocation of one segment of society in favor of another. This is necessary in a free society and merely represents the push and pull of diverse societal groups. Here, however, we are dealing with an evidentiary question, which affects the very essence of any trial.

Imposing a rigid rule on the several states can have a stultifying effect. The present case is an excellent example of the potential mischief a superimposed Federal rule, rigidly imposed, can cause.

The Tennessee Constitution, Art. I, sec. 9 grants to every accused the same rights as does the Sixth Amendment with respect to confronting witnesses. The Tennessee Supreme Court found Stubbs had a fair trial, and the Second Circuit found he did not. Presumably, the trial judge understood his State's rules of evidence. Had he known a different rule might be used several years later to review his decision he might have required the prosecutor to make a better record.

The answer to the problem we feel is to apply the Fourteenth Amendment "due process" test without specific

reference to the Sixth Amendment. See the concurring opinion of the late Justice Harlan, in *Pointer v. Texas,* 380 U.S. at 408, 85 S. Ct. at 1070.

This will not limit the availability of habeas corpus relief in any way. What it will do, is allow the states to experiment, and to change their rules with the changing times and conditions.

In *California v. Green,* 399 U.S. 149, 90 S. Ct. 1930 (1970), the California Supreme Court reversed a lower State Court on the grounds that the introduction of a prior statement in evidence was a violation of the Confrontation Clause, even though California statutes specifically permitted the procedure followed in the trial court. This Court reversed. The specific holding is not relevant to our case, except that it points up the difficulties of trying to reconcile State and Federal rules. See the separate concurring opinions of the Chief Justice, and Justice Harlan.

In discussing the applicability of certain elements of the Bill of Rights to the states, Justice Cardozo said in *Palko v. Connecticut* (302 U.S. 319, 58 S. Ct. 149 (1937)) that the Fourteenth Amendment would require application of those rights which were "**** found to be implicit in the concept of ordered liberty ***." (302 U.S. at 325, 58 S. Ct. at 152).

The specific holding as well as the dicta in *Palko* has since been reversed. However, we hope the logic of the phrase just quoted has not been discredited.

Since this Court has told us that not all hearsay was intended to be excluded (*Dutton v. Evans,* 400 U.S. 74, 91 S. Ct. 210) we see no reason to specifically impose the Confrontation Clause on the states, when the due process clause of the Fourteenth Amendment will serve the same purpose, with more flexibility.

POINT II

Respondent's confrontation right was not violated by the introduction into evidence of an earlier sworn statement by a witness residing out of the United States.

The majority below was apparently troubled by the non-appearance of the witness Holm, even though he was then known to be a resident of Sweden, and beyond the jurisdiction of any court in this country. It therefore held, following *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318 (1968), that the prosecutor did not make a great enough effort to induce Mr. Holm to voluntarily return to Tennessee.

We feel that the rationale behind *Barber* is not applicable to the case of a witness completely beyond the court's jurisdiction.

We fully support the position of the Attorney General of New York on this point. In the event our argument in Point One is not persuasive, then we feel reversal is required on the facts and the argument of the Attorney General.

POINT III

Sworn testimony, subject to cross examination satisfies the hearsay rule; demeanor evidence is not required in all cases.

In addition to the arguments advanced by the Attorney General of New York, we ask the Court to consider the distinction made by Dean Wigmore between the right to cross examine and the right to have the witness present in the courtroom (Wigmore on Evidence, §1395-97, 3rd Ed., 1940).

The right to confront the adverse witnesses was designed to avoid anonymous accusations, and trial by affidavit. However, once the witness is cross examined under oath, then the confrontation rule is satisfied. The remaining right—to have the fact trier view the witness—is not an absolute, and may be dispensed with. This right was referred to as demeanor evidence by Dean Wigmore.

We believe that no violence was done to respondent's rights by dispensing with the demeanor evidence in this case, since the witness was fully cross examined at the first trial, the transcript of which was introduced at the second trial.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1971

No. 71-237

Supreme Court U. S.
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MICHAEL RODAK, JR., CLERK

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

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5 Wigmore, Evidence § 1367 (3d ed. 1940) 17
28 U. S. C. § 1783 ..... 7, 8
28 U. S. C. § 2241 ..... 4, 7
1948, Pub. Law 646; 62 Stat. 949 7
1964, Pub, Law 88-619, § 10 (a); 78 Stat. 997 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM; 1971

No. 71-237

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,[1]

Petitioner,

against.

WILLIAM C. STUBBS,

Respondent.

STATEMENT OF CASE

An earlier Tennessee conviction was used by the State of New York to give the respondent William C. Stubbs increased punishment following a New York conviction. After exhausting his state remedies[2] Mr. Stubbs applied for *habeas corpus* relief to the United States District Court for the Western District of New York. In *United States* ex rel. *Stubbs* v. *Mancusi*, 442 F. 2d 561, the Court of Appeals for the Second Circuit reversed, with one judge dissenting, the decision denying relief.

[1] When this proceeding was begun, Vincent R. Mancusi was the Warden of Attica Prison. As such he had custody of the respondent Stubbs. Later the name of the institution was changed to "Attica Correctional Facility" and the title "warden" to "superintendent". The present superintendent is Ernest L. Montanye.

[2] See the decision of the United States District Court for the Western District of New York, dated June 30, 1969; ¶5 (printed as Appendix D, p. 14a, to petition for certiorari).

The court below held that the Tennessee conviction had been obtained in violation of the respondent's right to confrontation. At the Tennessee trial the prosecution's primary witness did not appear, but earlier testimony of his was read into evidence. No effort had been made by the prosecutorial authorities in Tennessee to obtain this witness' attendance at the trial. It was shown only that the witness had moved to Sweden.

ARGUMENT

POINT I

THE RESPONDENT WAS DEPRIVED OF HIS RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM BY THE READING AT HIS TENNESSEE TRIAL OF THE PREVIOUS TESTIMONY OF A WITNESS WHO WAS RESIDING IN SWEDEN AND WHOSE PRESENCE AT TRIAL THE PROSECUTION HAD MADE NO EFFORT TO OBTAIN.

This Court has steadfastly held that the Sixth Amendment right of an accused to confrontation applies to the States through the force of the Fourteenth Amendment.[3] *Pointer* v. *Texas*, 380 U. S. 400, 403; *Douglas* v. *Alabama*, 380 U. S. 415, 418; *Brookhart* v. *Janis*, 384 U. S. 1, 4; *Barber* v. *Page*, 390 U. S. 719, 721; *Bruton* v. *United States*, 391 U. S. 123, 126; *Illinois* v. *Allen*, 397 U. S. 337, 338; *California* v. *Green*, 399 U. S. 149, 150-151; *Dutton v. Evans*,

[3] The Sixth Amendment to the United States Constitution provides (in part): "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence." The Fourteenth Amendment provides (in part): ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

400 U. S. 74, 79; *Nelson* v. *O'Neil*, 402 U. S. 662, 665, 29 L. Ed. 2d 222, 226.[4]

Pointer v. *Texas*, 380 U. S. 400, involved use at trial of the testimony of a robbery victim. It had been recorded at a preliminary hearing at which the defendant was without counsel and did not try to cross examine the victim. The Court held that the right of confrontation guaranteed by the Sixth Amendment and carried into state criminal cases by the Fourteenth Amendment was denied Mr. Pointer: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal" (380 U. S. 400, 405).

In *Barber* v. *Page*, 390 U. S. 719, this Court held that Oklahoma could not use the preliminary hearing transcript of the testimony of a witness, who at the time of trial was incarcerated in a federal prison 225 miles away in Texas.

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[4] The argument is made in the brief of the District Attorney of Monroe County, *Amicus Curiae*, that *Pointer* v. *Texas*, 380 U. S. 400 should be overruled, as improperly imposing a federal hearsay rule on the States. This is not what the Court held in *Pointer* (see 380 U. S. 400, 407 and *Dutton* v. *Evans*, 400 U. S. 74, 80, 105, footnote 7). But even if, as it is argued, "[t]he answer to the problem we feel is to apply the Fourteenth Amendment's 'due process' test without specific reference to the Sixth Amendment" (*Amicus Curiae* brief, pp. 4-5), reverting to such a rule would not affect the outcome of the present case. As will be shown, the present case is not significantly different from *Pointer* v. *Texas*, 380 U. S. 400, or *Barber* v. *Page*, 390 U. S. 719. In those cases the late Mr. Justice Harlan, who forcefully argued against the so-called "incorporation" doctrine (and for the position apparently favored by the *Amicus Curiae*), nevertheless, concurred in the results, holding that the petitioner in *Pointer* was deprived "of a right of 'confrontation' assured by the Fourteenth Amendment" (380 U. S. 400, 408) and that the State's failure to attempt to obtain the presence of the witness involved in *Barber* denied due process (390 U. S. 719, 726).

The accused Barber and the witness had originally been co-defendants represented by the same attorney. At the preliminary hearing the witness waived his privilege against self-incrimination. The attorney then withdrew as to him but continued to represent Mr. Barber. This attorney did not cross examine the witness at the preliminary hearing. The State argued in *Barber* that the introduction of the transcript was proper since the witness was outside the jurisdiction and therefore unavailable at the time of trial, and that the right of cross examination was afforded the petitioner Barber at the preliminary hearing although not utilized then by him. For the purpose of decision it was assumed: "that petitioner made a valid waiver of his right to cross-examine Woods at the preliminary hearing, although such an assumption seems open to considerable question under the circumstances. [Footnote omitted.] We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma" (390 U. S. 719, 722-723).

The Court noted that with respect to a prospective witness currently in federal custody, 28 U. S. C. § 2241 (c) (5) gives federal courts the power to issue writs of *habeas corpus ad testificandum* at the request of state prosecutorial authorities and that the federal Bureau of Prisons permitted inmates of federal prisons to testify in state court criminal proceedings pursuant to writs of *habeas corpus ad testificandum* issued out of state courts. The court held: "In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal

authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' 381 F. 2d, at 481. In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." (390 U. S. 719, 724-725).

Barber v. *Page*, 390 U. S. 719, has been given fully retroactive application. See *Berger* v. *California*, 393 U. S. 314, in which the Court noted that some effort, although ineffective, had been made on the part of the prosecution to contact as a prospective witness the victim of the alleged robbery and kidnapping; he was in Colorado at the time of the accused's California trial.

In the present case the only prosecution eye-witness to the homicide was a Mr. Alex Holm.[5] We can start, as did the Court in *Barber* v. *Page*, with the fact that the State of Tennessee made absolutely no effort to obtain the presence of Mr. Holm at trial. It only saw fit to ascertain that he was residing in Sweden. This was established by means of the testimony of Mr. Holm's son, summarized

[5] The witness' name is frequently spelled "Holmes" in the transcript of the 1964 Tennessee trial. The testimony of the witness Holm, as originally given at the 1954 Tennessee trial and read at the 1964 trial by the original court reporter, is reproduced in full in the joint appendix (A. 36-74 on rebuttal, A. 103-105). The respondent William Charles Stubbs' testimony, as defendant in the 1964 Tennessee trial, is reproduced in full in the joint appendix (A. 75-102). The testimony of the other witnesses at the 1964 trial is summarized in appendix A to this brief, p. 1a, *et seq.* The harmful effect of Mr. Holm's testimony is discussed in detail under Point II, parts A and D, below.

below at pp. 4a-5a and by a return made on a subpoena by a Texas sheriff, which had been sent down by the prosecution for a deliberately futile attempt at service in the County of Mr. Holm's former residence (see the summary at p. 11a, below). But this is as far as the prosecution went.

There is an uncontradicted assertion by one of Mr. Stubbs' 1964 counsel that the prosecuting attorney had stated that he would have Mr. Holm present (p. 17a, below) and that Mr. Holm's son had stated outside of the courtroom that his father did not even know the case was being tried (p. 17a, below).

The prosecution should have offered Mr. Holm his traveling expenses and asked him if he was willing to attend the 1964 trial voluntarily. The respondent Stubbs' right to be confronted with the witnesses against him required no less.

The petitioner argues that requirement of a good-faith effort to obtain the presence of the witness should be excused because Mr. Holm was residing more than 4,000 miles from the place of trial and because of "the witness' immunity from any form of process, intra or interstate."[6] In this era of convenient jet travel mere distance is no deterent. The petitioner apparently does not question the application of the decision in *Barber* v. *Page*, 390 U. S. 719 *within* the United States. But Honolulu, Hawaii is about the same distance from Blountville as is Sweden.[7]

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[6] Petitioner's brief, p. 12. The trial was held in Blountville, Tennessee, (appendix A, p. 1a, below), which is near Bristol, Tennessee (see the testimony of Captain Frank Williamson, summarized at pp. 2a-3a, below). Bristol is about 4,689 miles from Stockholm, Sweden. *Standard Highway Mileage Guide*, Rand McNally, 1966, p. 46 column 2; *The New York Times, Encyclopedic Almanac*, 1971, pp. 662, 664-5.

[7] Using the tables referred to in the preceding footnote, it is about 4,542 miles from Honolulu.

Distance was no factor. The prosecution summoned Mr. Holm's son more than 1280 miles from his residence in Texas, and only to testify that his father was living in Sweden![8] A further indication of the hollowness of the prosecution's efforts to secure Mr. Holm's presence is the sending of a subpoena for him down to Texas, when it was quite apparent he no longer lived there (T. 118-119; appendix A. p. 11a, below).

Process, moreover, may have been available in 1964 to compel Mr. Holm's attendance at trial. A broad construction has been given to 28 U. S. C. § 2241 empowering federal courts to issue writs of *habeas corpus ad testificandum* to compel a prisoner's attendance at a state trial, even though the statute does not expressly mention state courts[9] *Barber* v. *Page*, 390 U. S. 719, 724. A similar construction could have attached to 28 U. S. C. § 1783 which provided at the time of the respondent's 1964 trial (in part): "(a) A court of the United States may subpoena, for appearance before it, a citizen or a resident of the United States who: . . . (2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General . . ."* The statute did not say that the criminal proceeding had to be pending in a federal Court. The statute did not purport to limit the power of the Attorney General to "desire", if he chose, that the witness be subpoenaed to a nearby federal court for later appearance in a state criminal proceeding. Compare the policy of the United States Bureau of Prisons to honor writs of *habeas corpus ad testificandum*

[8] See T. 58, *et seq.*, summarized at pp. 4a-5a, below, and *Standard Highway Mileage Guide*, Rand McNally, 1966, p. 46 column 4.

[9] The pertinent provision of 28 U. S. C. § 2241 reads in part: "(c) The writ of habeas corpus shall not extend to a prisoner unless . . . (5) It is necessary to bring him into court to testify or for trial."

* See 1948, Pub. L. 646; 62 Stat. 949.

issued out of state courts. *Barber* v. *Page*, 390 U. S. 719, 724. Following the respondent's trial Congress amended 28 U. S. C. § 1783, so that now, "A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, . . ." (October 3, 1964, Pub. L. 88-619, § 10(a), 78 Stat. 997). Mr. Holm was a naturalized citizen of the United States (A. 40; T. 178) and, thus, was amenable to this process.

Even assuming that the present case contained no issue as to the effectiveness of the cross examination of Mr. Holm at his first Tennessee trial, the respondent Stubbs was still deprived of his right to be confronted with the witnesses against him. *Barber* v. *Page*, 390 U. S. 719, 722; *Dutton* v. *Evans*, 400 U. S. 74, 85. The judgment of the court below should be affirmed.

POINT II

THE ADMISSION INTO EVIDENCE OF THE PRIOR RECORDED TESTIMONY WAS HARMFUL ERROR; THE RESPONDENT HAD BEEN DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE CROSS EXAMINATION OF THE WITNESS AT THE FIRST TRIAL.

A. *Harmless error issue, in general.*

It is absolutely impossible to imagine that the respondent William C. Stubbs would ever have been convicted without the accusations and testimony of Mr. Holm. The other witnesses testified only about the procedures following Mr. Stubbs's arrest, the medical attention given to Mr. Stubbs and to Mr. Holm, the procedures of trial, the exculpatory statements of the defendant, the identification at the hospital of Mr. Stubbs as being the man who shot Mr. Holm

and his wife (see summary of the testimony, appendix A, pp. 1a-19a, below). It is quite clear that if reading the prior testimony of Mr. Holm was—without going into the effectivenses of cross-examination—error, it was critical and harmful error.

B. *Binding effect of Stubbs* v. *Bomar.*

Mr. Stubbs was arrested on the day of the homicide, June 11, 1954; he was assigned three attorneys on July 8, 1954; he was arraigned on July 9, 1954; and he went to trial on the capital charge on July 12, 1954.

In *Stubbs* v. *Bomar,* (U. S. D. C. . M. D. Tenn.; January 6, 1964)[10] Hon. William E. Miller, District Judge, declared null and void the respondent's 1954 Tennessee judgment of conviction: "The Court is of the opinion that the evidence and the record show that the Constitutional rights of petitioner Stubbs were violated at the time of his trial in the Criminal Court of Sullivan County in that his Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial, and as a result the petitioner was denied effective representation by counsel" (p. 22a, below).

The court below said: "Judge Miller's decision, however, even though it were binding on New York, would not establish the ineffective cross-examination of Holm, but only the prejudice to the totality of defense preparation from late appointment of counsel." *United States* ex rel. *Stubbs* v. *Mancusi,* 442 F. 2d 561, 564 (A. 23, 28). Nevertheless, it may well be that the State of New York is bound by the decision in *Stubbs* v. *Bomar* and that the decision makes unnecessary meticulous examination of the record to demon-

[10] Reproduced as appendix B, below, pp. 20a-23a.

strate the ineffectiveness of the cross-examination of Mr. Holm.

The petitioner cites *Chambers* v. *Maroney*, 399 U. S. 42, which held, ". . . we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel" (399 U. S. 42, 54). The petitioner apparently attacks the decision made by Judge Miller in *Stubbs* v. *Bomar* in 1964.[11] It does not appear that *Stubbs* v. *Bomar* was ever appealed from or questioned by the Tennessee prosecutorial authorities, who, following the decision, promptly awarded the respondent Stubbs a new trial. It ill behooves the State of New York now to challenge for the first time this decision, especially when the State of New York is relying for its increased punishment upon the respondent's conviction at the second Tennessee trial. This conviction would never have come into existence without *Stubbs* v. *Bomar*; it is a carefully considered decision, undoubtedly quite correct, and certainly proof against such an unseemly and belated attack.

The respondent Stubbs was deprived of the effective assistance of counsel at the 1954 trial. This conclusion cannot be avoided by taking the record to pieces.

The use of the rule of collateral estoppel in criminal cases has been clarified by *Ashe* v. *Swenson*, 397 U. S. 436: "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between

[11] Petitioner's brief, p. 17.

the same parties in any future lawsuit" (397 U. S. 436, 443-445).

Since it is established that the representation by counsel in 1954 was ineffective as a whole, it is sinking to hypertechnical niceties to argue that the cross examination of the only eyewitness was an island of effectiveness in a sea of ineffectiveness. Clearly, the respondent Stubs' 1954 counsel had nothing to prepare for, except the cross examination of Mr. Holm, and except the decision whether to call Mr. Stubbs to the stand or not. There was nothing much to do during the other parts of the trial except to sit and listen. "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe v. Swenson*, 397 U. S. 436, 444. Realistically and rationally approached, the ineffectiveness caused by tardy appointment of counsel in 1954 must have diminished seriously the effectiveness of the cross examination of Mr. Holm. The State of New York, which is in privity with the State of Tennessee, is collaterally estopped from claiming that the 1954 cross examination was effective.

C. *Inquiry to be made in determining whether error harmful.*

Before discussing the evidence in detail it is important to consider what factors determine whether error is harmful. The petitioner states without support that the court below adopted reasoning which "suggests an analogy to the rule that evidence is insufficient unless all reasonable hypotheses except guilt are excluded".[12] This served as an introduction to a string of cases having nothing to do with harmless error, dealing instead with what constitutes suffi-

[12] Petitioner's brief, p. 15.

cient evidence to convict under various federal criminal statutes.[12]

The distinction between a harmless error issue and a sufficiency of evidence issue is strongly drawn in *Glasser* v. *United States*, 315 U. S. 60, which held as to sufficiency of evidence: "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (315 U. S. 60, 80); but which also held: "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of [his attorney as counsel for a codefendant] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial" (315 U. S. 60, 75-76).

The court below was fully in accord with this Court's decisions on the harmless error rule. See *Chapman* v. *California*, 386 U. S. 18, in which it was held: "There is little, if any, difference between our statement in *Fahy* v. *Connecticut* [375 U. S. 85, 86-87] about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a

[12] "The only one of the cases cited, which even peripherally deals with harmless error, is *Bailey* v. *United States*, 410 F. 2d 1209, 1217 (10th Cir.) cert. den. 396 U. S. 933.

belief that if was harmless beyond a reasonable doubt" (386 U. S. 18, 24).

The test, then, in determining whether the 1954 cross examination of the witness Holm was ineffective is not whether the 1964 conviction was supported by sufficient evidence. This is not an issue. The question was concluded against the respondent on his direct appeal to the Tennessee Supreme Court. *Stubbs* v. *State*, 216 Tenn. 567, 573; 393 S. W. 2d 150, 152.

It is for the *jurors* solely upon the basis of proper evidence, to decide the issue of guilt. In a much-quoted passage written by Judge Fuld for the New York Court of Appeals in *People* v. *Donovan*, 13 N Y 2d 148, 243 N. Y. S. 2d 841, 193 N. E. 2d 628, it was eloquently said: "It cannot be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence. The constitutional and statutory safeguards provided for one accused of crime are to be applied in all cases. The worst criminal, the most culpable individual, is as much entitled to the benefit of a rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade us of a defendant's guilt would but lead to erosion of the rule and endanger the rights of even those who are innocent" (13 N Y 2d 148, 153-154).

D. *Cross examination of Mr. Holm as inadequate.*

Mr. Holm testified on direct examination[14] that while he and his wife were at a roadside picnic area, near Cherokee

[14] As read at the 1964 trial Mr. Holm's direct examination consumed 33 pages of the transcript (A. 36-61; T. 174-207); cross consumed 10 pages (A. 61-67; T. 207-217); redirect, 17 pages (A. 67-72; T. 217-234), to which there was no cross examination. There also were three pages of direct rebuttal (A. 103-105; T. 284-287) to which there were three questions asked on recross examination (A. 105; T. 287).

Lake in Tennessee they were approached by the defendant William C. Stubbs (A. 43). A brief conversation took place, and then the defendant walked away (A. 43). When Mr. and Mrs. Holm were just about to leave, the defendant Stubbs came back with a gun in his hand (A. 43). Mr. Stubbs said: "This is the way I am going to catch my ride to Bristol and I am going to do the driving" (A. 44). He threatened to kill both Mr. and Mrs. Holm if they did not get in the car (A. 44). Mr. and Mrs. Holm got in the back seat, with Mr. Holm to the far right (A. 45). Mr. Stubbs drove the automobile, steering with his right hand and holding the gun with his left (A. 45).

They drove through several Tennessee towns (A. 46-47). All of a sudden, according to Mr. Holm: "Well, he was driving along, but he was just looking first one place and then another and looking at his rear mirror. When we got to that place he started shooting" (A. 49). "Q. When he shot, did he say anything, Mr. Holm? A. No, he didn't say a word. Q. Where did he hit you? A. In my face" (A. 50). "When he started shooting, I jumped up and grabbed the gun. . . ." (A. 52). "Q. How long did it take you to get that pistol away from him? A. It didn't take no time. When I jumped on him and jerked that pistol away there was a shot went up" (A. 53).

The car was still moving. "Well, he was trying to get out, but, of course, the combination of the lock, he tried to get that lever down, he tried that three or four times. Finally he found out it went out. Then he stepped on that brake on the car and slid out backwards. Q. What happened to the car? A. I got hold of the steering wheel and kind of whirled it around so it didn't hit the embankment, because it was coming right nearly across the road" (A. 55). "Q. How long after that was it until any person stopped?

A. There was people right there it looked like. It didn't take—I don't think it took half a minute" (A. 59).

The defense offered by Mr. Stubbs, who testified at both trials (A. 75; Appendix A, p. 11a, below), was that while he originally forced himself on the Holms from desperation and hunger (A. 78, 80, 81)[15] he gained their sympathy during the course of the trip and in effect became their guest (A. 82-83). In response to a request from Mrs. Holm, Mr. Stubbs put the gun down on the seat beside him (A. 83). They passed a police officer, with no outcry from the Holms (A. 84). Mr. Stubbs began to relax (A. 84). Then, as they passed a crowd of people (A. 99): "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in clear focus, but in a reddish haze. I mean there was no pain or nothing. . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and I heard this loud roar, bang" (A. 85). Bleeding, Mr. Stubbs escaped from the car (A. 85).

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The 1964 trial jury was instructed to acquit if it believed the theory of the defense or had a reasonable doubt of Mr. Stubbs' guilt (p. 19a, below). Mr. Stubbs' version of what happened is by no means incredible. On the other hand, parts of Mr. Holm's version are mighty hard to swallow.

The trip began at a secluded roadside picnic area and extended over more than 50 miles of highway. If (as Mr. Holm said) Mr. Stubbs started shooting without any provocation by the Holms, why did Mr. Stubbs choose to do this

[15] ". . . and I thought that there wouldn't be much wrong with getting a ride if I didn't bother them or take anything that they had or nothing" (A. 81).

where there is a crowd of people nearby, while the car is moving, and after he has begun to relax? Yet, if Mr. Holm had been waiting for a chance to try to seize the gun and struggle with Mr. Stubbs, these are the exact circumstances he would have been looking for.

Mr. Holm managed to get control of the gun, he said: by just reaching for it and jerking it away—after he had been shot twice in the face by Mr. Stubbs. It seems far more likely that Mr. Holm got control of the gun by pouncing on it while his faculties were intact and when Mr. Stubbs could be taken unawares.

Holm's testimony cries out for vigorous cross examination. A cross-examiner is fortunate to have a lying witness trip up on some minor details in his direct testimony (such a witness has usually rehearsed himself on the main parts of his story). Here we have a witness offering unlikely testimony about the very heart of the case. What prepared counsel might have done on cross examination!

Instead, we have eight pages of aimless rehashing of the witness' testimony on direct examination on the route taken (A. 61-66; T. 207-215). Not one question, not one, was asked about the struggle and shooting. Not one question was asked on behalf of the defendant about the development of real or apparent friendly relations.

When in rebuttal on direct examination the witness was led to say that there never were any friendly relations between the Holms and Mr. Stubbs (A. 104), we get a feeble attempt at impeaching that came to nothing and appears to have been abandoned by counsel (A. 105). The impression given by the portion of the 1954 trial revealed at the 1964 trial is that of woefully unprepared defense counsel, particularly shown in the halting and ineffective cross examination of Mr. Alex Holm.

Defense counsel or in 1964 were prepared to do the thing right. See particularly the proposed questions for a cross-examination Nos. 6, 7, 9, 10, 11 12 (A. 73-74).

When the testimony of Mr. Holm was read at the 1964 trial, the respondent Stubbs lost the opportunity of compelling Mr. Holm to stand face to face with the jury in order that they might look at him and judge by his demeanor upon the stand and the manner in which he gave his testimony whether he was worthy of belief. *Mattox* v. *United States*, 156 U. S. 237, 242. Because of the unpreparedness of his 1954 counsel, the respondent has effectively been deprived of his right to cross examine Mr. Holm: "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, *e. g.* 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas*, 380 U. S. 400, 404. At the time the Sixth Amendment was adopted, moreover, mere absence from a jurisdiction justified no exception to the common law right of confrontation.[16] The 1964 Tennessee conviction of the respondent should not survive.

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[16] The exceptions were (1) death of the witness or (2) absence because of the defendant's connivance. *Regina* v. *Scaife* (1851) 17 Q. B. 238; 242, 244; 2 Den. C. C. 281, 285-286; 5 Cox C. C. 243, 245, 246; *Motes* v. *United States* (1900) 178 U. S. 458, 471-473; *Wilbur* v. *Seldon* (1826, N. Y. Sup. Ct.) 6 Cowen 165; *LeBaron* v. *Crombie* (1817) 14 Mass. 234, 235.

CONCLUSION.

The Tennessee prosecutorial authorities failed to make any good faith effort to obtain the presence at trial of the prosecution's indispensible witness, a citizen of the United States residing in Sweden. The reading of the recorded testimony of this witness deprived the respondent of his right of confrontation. The failure of the State to try to get the witness to come to the trial voluntarily is not excused by the distance to his new residence nor by the fact that it is in a foreign country. A means may have existed to have compelled the witness' attendance.

The testimony read was highly damaging to the defense. The introduction of it was harmful error. The testimony was recorded when the respondent was being deprived of the effective assistance of counsel. The State of New York is bound by the Tennessee federal district court's adjudication of this and is estopped from contending that counsel had effectively cross examined the witness. Review of the cross examination of this witness shows that it clearly was ineffective.

The State of New York should not have used the Tennessee conviction as a predicate for increased punishment of the respondent. The judgment of the court below, granting *habeas corpus* relief, should be affirmed.

Respectfully submitted,

WILLIAM C. STUBBS,
Respondent,

By his attorney,
BRUCE K. CARPENTER.

Dunkirk, New York,
March 31, 1972.

APPENDIX A

Tabular Summary of Testimony at Respondent's Second Tennessee Trial

Okley Feathers.

The respondent's Tennessee conviction in 1954 was declared null and void in Federal *habeas corpus* proceedings by an order of Hon. William E. Miller, Judge of the United States District Court for the Middle District of Tennessee, entered on January 6, 1964 (this decision is reproduced as Appendix B, below). The respondent's second Tennessee trial began on July 20, 1964. A certified copy of the transcript of the 1964 trial has been filed with this Court. Since the testimony of only two of the witnesses at the 1964 trial is reproduced in the joint appendix (pp. A.36-105), a brief summary of the other witnesses' testimony follows:

Okley Feathers (T. 2-20; 153-158)* was the deputy Court Clerk who had custody of the records relating to the prosecution of William Charles Stubbs (T. 2). It was proved by the minutes of the July term, 1954, that the jury had found the defendant William C. Stubbs guilty of murder in the first degree, felonious assault with intent to commit murder in the first degree (for which he was sentenced to concurrent terms of imprisonment of ninety-nine years and three to twenty-one years) and guilty of kidnapping in two cases (for which he had been given concurrent sentences of two to ten years), but the kidnapping

* The numbers in parentheses preceded by "T." refer to the pages of the 1964 trial of the respondent in the Criminal Court, Blountville, Sullivan County, Tennessee. This transcript as prepared for the Tennessee Supreme Court, was denominated "bill of exceptions", and was filed with the Tennessee Supreme Court on March 23, 1965. References to pages of the printed appendix in this Court will be preceded by "A.".

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Okley Feathers; Frank Williamson.

sentences were to run consecutively with the murder and assault sentences (T. 6). The prosecution introduced a copy of the order from the United States District Court of the Middle District of Tennessee, civil action No. 3585 before Hon. William E. Miller (T. 19; 153-158; see Appendix B, below).

FRANK WILLIAMSON (T. 21-38) was a captain with the highway patrol and was commanding officer of the division including Sullivan County, Tennessee, on July 11, 1954 (T. 21). The highway patrol investigated a wreck near Blountville and then began to look for an individual on foot (T. 22-23). At dusk a roadblock was set up (T. 23). It was at the hospital that the witness first saw the defendant Stubbs, who had a shot wound in his head and a powder burn on his left hand (T. 23-24). Mr. Stubbs was observed to be left-handed (T. 24). The defendant was questioned at the police station in Bristol, Tennessee: "I asked him about the gun and he said, I have no gun. I asked him where he had been and he stated that he had been in and around Cherokee Lake. He had been fishing. I asked him where he got that head wound and he said that he fell on some rocks while fishing. I asked him about his hand and as I remember, he didn't make any statement about his hand" (T. 26). The defendant denied having a gun at the time (T. 28).

The defendant Stubbs was taken in a patrol car to the hospital, handcuffed to one of the officers (T. 28-29). He was taken to the room of a Mr. Holm (T. 29):* "Well, he

* The spelling given for "Holm" in the transcript was at times "Holmes".

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Frank Williamson; Jim Pendergrass.

[Mr. Holm] had been shot in the head and we asked him a question of Mr. Stubbs who was there, who shot him and he said, that boy there . . . . . He said, that is the man that shot me and killed my wife" (T. 29, 30).

The witness had measured the distance traveled by Mr. Stubbs in the company of Mr. and Mrs. Holm; it was approximately 52 to 55 miles (T. 31). On cross examination Captain Williamson testified that during the conversations by the police with the defendant there was always a number of uniformed and armed police officers present (T. 32-33). The route taken by Mr. Stubbs and the Holms led through Rogersville, a sizeable town, through Churchill, through the center of Kingsport, through Center Street, Blountville, to a place a couple of miles east of Blountville (T. 34-35). Mr. Stubbs had wounds on the top of his head, which were called to the attention of the police officers by a doctor at the hospital (T. 36).

JIM PENDERGRASS (T. 39-57) was an officer with the highway patrol (T. 39). He received a radio call and went to a place on the highway a mile or a mile and a half east of Blountville (T. 40). He found a black 1951 Ford with Texas license plates (T. 40). He found in the car an old model .32 Smith and Wesson pistol on the back floorboard of the car behind the front seat (T. 41). The gun had six empty shells in it and had blood on it (T. 41). There was blood all over the interior of the car (T. 42). When Mr. Pendergrass arrived Mr. Holm was there injured, but Mrs. Holm, the deceased, was not there (T. 43). A search, which was to last approximately six hours, began (T. 43).

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Jim Pendergrass; Burl Q. Holmes.

It was approximately 2:00 o'clock in the afternoon when the witness arrived at the scene (T. 44). The witness first saw the defendant Stubbs at the police station in Bristol that night (T. 44). The defendant was about five and one-half feet tall and weighed about one hundred forty or one hundred fifty pounds (T. 44). Mr. Pendergrass did not hear the defendant Stubbs make any statements that night (T. 44). The defendant had on a brown shirt which was bloody all over (T. 44). The defendant had about a two or three days' growth of beard (T. 44, 45). The next day the witness had a conversation with the defendant Stubbs (T. 45). The defendant said he had been hitch-hiking from Texas up through North Carolina to Bristol (T. 46).

On cross examination Mr. Pendergrass testified that when he got to the 1951 Ford with the Texas license nobody was in it (T. 50). The car was a two-door model (T. 51). The gun was lying in open view on the floor of the rear seat, directly behind the driver's seat (T. 51). Blood was found on both the floor and the back seat (T. 52). The witness did not hear any of the police officers ever advise Mr. Stubbs of his right against self-incrimination (T. 53). The witness recalled that there were blood spots on the front of Mr. Stubbs' shirt, but could not recall any blood on the back (T. 54). The witness remembered that there was at least one deep gash on the defendant Stubbs' head (T. 56).

Burl Q. Holmes (Holm) (T. 58-63) was the son of the deceased Mrs. Ruby Holm and of Mr. Alex Holm (T. 58). Burl Q. Holmes lived in George West, Texas, about 80 miles southwest of San Antonio (T. 58). The witness' father, Mr. Alex Holm, was living at the time of the 1964

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Burl Q. Holmes; Bernie Webb.

Tennessee trial in Ekskogen, Sweden (T. 59). His mother and father were going to Providence, Rhode Island and from there they were going to fly to Sweden (T. 59). They had left Texas four days before Mrs. Holm died (T. 60). The witness' father, Mr. Holm, was about five feet ten and one-half inches tall and weighed about two hundred thirty-five pounds; physically, he was strong; he wore gold rimmed bifocals (T. 60, 61). Mr. Holm was born on December 24, 1892, and came to America in 1908 (T. 62). The witness' mother and father had lived on a farm they owned at Karnes City, Texas, about 60 miles southeast of San Antonio (T. 62).

BERNIE WEBB (T. 63-73) was the athletic director at Blountville, Tennessee, High School (T. 63). Early on the evening of June 11, 1954, he was driving toward the highway between Bristol and Blountville (T. 65). Later he left this highway and went on to a side road, where he saw the defendant Stubbs coming toward the highway (T. 65-66). The witness turned around, came back, and asked the defendant if he wanted a ride (T. 66). The defendant said he had come from Texas and was headed toward New York hitch-hiking (T. 66): ". . . he said that he had injured his head. There was some blood on his head and he said that he had injured his head that he had fell on some rocks . . . I mean that he fell and hit his head against a rock" (T. 66). The witness and the defendant went on the highway toward Bristol (T. 67). In about four miles they approached the roadblock (T. 67). There were several people at the roadblock, including a Sergeant Seahorn (T. 68): "I said, I believe that this is your man. And that is all that I said" (T. 68).

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Bernie Webb; John O. Marcy; J. L. Seahorn.

On cross examination Mr. Webb testified that at no time did the defendant give him any trouble or try to get out of the automobile (T. 71).

JOHN O. MARCY (T. 73-77) was a medical doctor practicing in Bristol, Tennessee, Virginia (T. 73). He examined the defendant William Charles Stubbs at Bristol Memorial Hospital on the evening of June 11, 1954 (T. 74):

> "Q. Would you describe his condition? A. He was on the . . . he was brought into the emergency room by the highway patrol and he was placed on the table, the examining table. He had several lacerations on the right side of his head.
>
> Q. Would you describe those lacerations, please? As best you recall. A. There were three small cuts above and behind his right ear.
>
> Q. Could you tell what had made those cuts, what had produced them? Could you tell from your examination what had produced them? A. It could have been a blow on the head, I would say?
>
> Q. Were they smooth cuts or were they ragged? [*75] Q. Do you recall the size of them? A. They would vary from one, to two, to three inches in length.
>
> Q. Were they deep cuts or shallow cuts? A. They were rather deep. They went through the scalp" (74-75.)

The cuts on the defendant's head were fresh, having been inflicted two to six hours before the examination (T. 75).

J. L. SEAHORN (T. 77-84) was an officer with the highway patrol on June 11, 1954 (T. 77). He and trooper Montgomery were manning a roadblock at an intersection on the highway leading from Blountville to Bristol (T. 77). Mr. Stubbs was arrested and taken out of Mr. Webb's car as

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J. L. Seahorn.

soon as it had driven up to the roadblock (T. 78). The defendant was wearing blue trousers and a khaki shirt; his trousers were torn in the left leg; he had a pretty long heavy beard and "was pretty rough looking" (T. 78). The witness observed that the defendant had blood on the front of his shirt (T. 78). After the defendant had been arrested and the officers started to Bristol with him, the defendant made a statement that he had been fishing down on Cherokee Lake, had fallen off a rock cliff, and had cut his head, which was where the blood had come from (T. 79). The defendant said that he was going to New York and had hitched a ride up (T. 79). The defendant was searched (T. 79). A pocket knife, one empty bullet shell and a billfold were found (T. 80). Mr. Seahorn later was among the officers who took the defendant to the hospital (T. 80): ". . . and one of the men asked Mr. Holmes [*sic*] if he could recognize anybody in that crowd, could recognize this man and Mr. Holmes pointed at him and said that is the man that killed my wife and shot me" (T. 80).

On cross examination Mr. Seahorn testified that when the Webb automobile reached the roadblock the defendant, who did not have any chance to get away, did not try to get away (T. 81-82). The defendant was immediately told he was under arrest for investigation of murder (T. 82). After the defendant Stubbs had reached the police department, he was accompanied by about five armed officers most of the time (T. 82-83). The defendant had cuts on his head which required treatment by a doctor (T. 83). When the defendant was taken up to Mr. Holm's room at the hospital, no individuals were up there with the defendant similar to him in size and appearance (T. 83).

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H. P. Montgomery.

H. P. MONTGOMERY (T. 84-98) was a corporal in the highway patrol on June 11, 1954 (T. 85). He had joined the original search (T. 86). After some two hours he went to the city limits of Bristol on the highway and set up a roadblock (T. 86). The defendant, when he got out of the Webb automobile, had a two or three days' growth of beard; his clothes were dirty and had blood on them (T. 87). A search of the defendant Stubbs produced a billfold, a pocket knife, and one pistol shell (T. 87). The defendant said that he got the blood that was on him from a fall while fishing at Cherokee Lake (T. 88). Mr. Montgomery was one of the officers who took the defendant to the hospital (T. 88). The witness recalled that one of the senior officers asked Mr. Holm "if he had seen this fellow before", and Mr. Holm ". . . pointed his finger at him and said, yes, sir, he said that is the man that killed my wife and shot me" (T. 88-89).

At least five uniformed officers accompanied the defendant to the hospital (T. 93-94). There was plenty of light in the hospital room (T. 95). The witness did not think that Mr. Holm had his glasses on (T. 95). The question asked Mr. Holm was "if he had seen this fellow before" (T. 95). At the time of this identification Mr. Stubbs was hand-cuffed and standing among the officers (T. 95). The defendant asked why he was being arrested; the witness responded that he did not know why (T. 96). At the identification procedure in the hospital, Mr. Holm was not shown anyone else similar in appearance to Mr. Stubbs; Mr. Holm was only asked if he had seen Mr. Stubbs before (T. 97).

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Roy Edwards.

Roy Edwards (T. 98-109) was employed on June 11, 1954, by the Bristol, Tennessee Police Department as an investigator (T. 98). At about 2:30 in the afternoon a call was received at police headquarters that a woman had been shot on the Old Blountville Highway (T. 99). The shooting took place approximately four and one-half miles west of Bristol (T. 99). A 1951 Ford with Texas license plates was in a ditch (T. 100). A search commenced; the police were looking for an individual about twenty-three to twenty-four years old, small in build, approximately five feet six or seven inches in height, dressed in khaki clothes (T. 101). Mr. Edwards first saw the defendant at police headquarters at about 8:00 P. M. (T. 101): "He had a heavy growth of beard on him, and blood on his shirt and small wounds on his head. Lacerations over his right ear rather, and one on his forhead [*sic*]. There was a wound on his hand, his left hand between his hand and his left finger" (T. 102). The witness asked the defendant where he got the wounds, "and he said that he fell on Cherokee Lake fishing" (T. 102). When the defendant signed a fingerprint card, he used his left hand (T. 102). When he was taken to the hospital room of Mr. Holms, the defendant Stubbs was handcuffed to Mr. Edwards (T. 103):

> "As you go into the room, Mr. Holmes [*sic*] bed is on the right. Doctor Harkrader went in and explained to Mr. Holmes our mission there and we walked in to the foot of the bed and Doctor Harkrader turned the ceiling light on. There was a small light on over the bed and Mr. Holmes raised up on his right elbow and looked at him and said that is the man that shot my wife and shot me.

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Roy Edwards; A. H. Hurd.

"Q. And who was he referring to? A. Mr. . . . the defendant" (T. 103).

Leaving the hospital room of Mr. Holm, the witness testified that the defendant Stubbs said that he had never laid eyes on the man (T. 104). Following this identification procedure in the room of Mr. Holm, the defendant Stubbs was taken to the emergency room where he was treated for his lacerations (T. 104). The witness received some items physical evidence, which were forwarded to the FBI laboratory in Washington (T. 105).

On cross examination Mr. Edwards testified that the .32 caliber Smith and Wesson gun, which the witness received from Captain Williamson, was loaded with empty shells (T. 106). No paraffin test was performed on Mr. Stubbs (T. 107). The witness, the two doctors, a constable and Chief Rogers were dressed in civilian clothing when the identification procedure was conducted at the hospital; the doctors had on suits, the constable was about fifty years old (T. 107-108). The witness did not recall whether Mr. Holm was wearing his glasses (T. 108).

A. H. Hurd (T. 109-113) was the Sheriff of Sullivan County, Tennessee on June 11, 1954. The entire force was out hunting for the suspect (T. 110). The witness saw the defendant first after he had been taken into custody (T. 110). The defendant Stubbs was asked by Sheriff Hurd about the injuries to his face and head, ". . . and as I remember he told me that he was fishing down on Cherokee Lake and fell and hurt himself" (T. 111).

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C. C. Wagner; Holm Subpoena; H. C. Smith.

CHARLES C. WAGNER (T. 113-118) was a member of the Sullivan County Sheriff's Department at the time of the 1964 trial and had the job of handling subpoenas (T. 113-114). In the absence of the jury, Mr. Wagner testified as to whether certain people were served with subpoenas on behalf of the prosecution (T. 116).

SUBPOENA FOR MR. ALEX HOLM. At this point in the trial (T. 118) the prosecuting attorney introduced into evidence a subpoena, "for Mr. Alex Holmes [*sic*] that was sent to the Sheriff of Karnes County, Texas in Karnes City. The return being made on this as Alex Holmes, on the 17th day of July, 1964 as being in Sweden" (T. 118-119).

HERMAN CONWAY SMITH (T. 120-132) was at the time of the 1954 trial the Tennessee District Attorney General (T. 120-121). Apparently in the absence of the jury (T. 121, lines 8-11), the witness gave recollections of his concerning Mr. Stubbs' testimony at the 1954 trial. The witness's recollection, as revealed on direct examination, was that Mr. Stubbs:

> ". . . stated that he first saw Mr. and Mrs. Holmes at a road side table in Hawkins County, Tennessee near Cherokee Lake. It seems that to the best of my recollection, Mr. and Mrs. Holmes were having lunch at the road side table only the two being present and that there was an automobile bearing a Texas license plate on it at the road side park. That he came up from the bank side which is nearer to the road side table about the time they were finishing their lunch and were fixing to get back in the car. He engaged with them in conversation, that he asked them where they were going aand they told him and he went around the automobile

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Herman Conway Smith.

and as he came back to where they sat at the road side table putting things in the car. He had a 32 pistol with him at that time. That he told Mr. and Mrs. Holmes to get into the back seat of the car and that he would drive. And that for some distance driving toward Kingsport from or on 11-W, I believe was the highway and he held the pistol in his left hand and he steered the automobile with his right. They came through Kingsport. They proceeded through Blountville. A short distance from Blountville, some distance West of Bristol, that some statement was made by them in the car and that the shooting took place . . ." (T. 123-124).

On cross examination the witness testified that he recalled Mr. Stubbs testifying that he had approached the Holms car because he wanted a ride (T. 125). The witness thought that Mr. Stubbs had testified in 1954 that when he came into Tennessee he did not have any money (T. 126); that Mr. Stubbs had traveled many places and had been walking a considerable period of time (T. 127); that he had discussed transportation with the Holms (T. 127).

The witness Smith was asked by defense counsel at the 1964 trial about whether he could recall Mr. Stubbs having testified in 1954 about beginning to talk with Mr. and Mrs. Holm, who were in the back seat of their automobile as they were driving toward Bristol (T. 128); about Mr. Stubbs just wanting a ride because he was hungry and about him not intending to hurt the Holms (T. 129); about Mr. Holms asking Mr. Stubbs to put the gun down, about Mr. Stubbs starting to put it in his belt and about Mr. Holm saying "why don't you put it down here on the front seat," about Mr. Stubbs doing this before the automobile ever got into Sullivan County (T. 129):

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H. C. Smith; C. Harkrader, Jr.; G. M. Blessing.

"Q. And you remember, don't you that Mr. Stubbs testified that after he was asked to put the gun down, he did and they became on friendly terms and friendly relationships before they ever came into trouble? A. Mr. Stubbs, testified, concerning a trip here, as to present language used, as to terms of friendly, there were objections and it was sustained by the court calling for a conclusion as to whether they were on friendly terms and that was a question for the jury . . .

"Q. Now, I am not asking you if it is a question for the jury. Now, you remember him testifying . . . A. Yes, sir, I remember him testifying" (T. 131).

FRANKLIN TALMADGE BUCHANAN (T. 133-138) was a physician practicing in Bristol, Tennessee, Virginia (T. 133). He had treated Mr. Holm on June 11, 1954, and thereafter for gunshot wounds of his face (T. 133). Mr. Holm had two wounds, one just below the left eye and another just lateral to that over his teeth (T. 133). One bullet had ended up in his neck and the other had ended up in his nasal passage (T. 133). One of the bullets had struck the bottom edge of one of the lenses in Mr. Holm's eye glasses (T. 134). The doctor was present at the time Mr. Holm identified Mr. Stubbs as his assailant (T. 135).

CHARLES HARKRADER, JR. (T. 138-141) was a doctor practicing in Bristol, Tennessee (T. 138). He had attended Mr. Holm who was suffering from two bullet wounds in his face which had been inflicted at rather short range (T. 134). The two bullets were removed, one from the nasal pharnyx and the other from the neck (T. 139).

GORDON M. BLESSING (T. 141-152), out of the presence of the jury, testified that as a Deputy Sheriff of Sullivan

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Gordon M. Blessing; Counsels' Objections.

County, Tennessee, he had served subpoenas upon some of the witnesses, but had been unable to locate seven named witnesses and had returned that three individuals sought as witnesses by the prosecution were deceased (T. 143).

DEFENSE COUNSELS' OBJECTIONS TO READING TESTIMONY FROM FORMER TRIAL. When the prosecution first announced its intention to read to the jury the testimony from the first trial, the defendant objected. A colloquy and ruling ensued (T. 159-164). This portion of the transcript of the 1964 trial, which was omitted from the joint appendix, is reproduced below in its entirety:

[*159] "Mr. Wooten [Assistant Attorney General, prosecuting]: If Your Honor please, the State purports to offern into the record, the testimony of the deceased witnesses and witnesses that we have not been able to obtain service on from the original trial. We have present the Court Reporter who transcribed the original record and she is here to read the testimony into this record.

The Court: Now, General, I think that you had better say which witnesses are going to be read. I think that you have two of them that you have admitted that they have admitted were dead. Which one are you going to read first, General?

Mr. Wooten: I would like to read Mr. Axel Holmes [Alex Holm], if Your Honor please.

Mr. Haynes [Defense Counsel]: Your Honor, it is our position that the law in this state, prohibits the reading of prior testimony of another witness who is still alive.

The Court: Have you any authorities on this question of when a person is out of the jurisdiction of the United States?

Mr. Haynes: The cases that we have Your Honor, hold that when a person is out of the jurisdiction of

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Counsels' Objections to Reading Former Testimony.

the United [*160] I mean the State and still alive, that person's testimony cannot be admissable [*sic*].

The Court: Now, does that say State or United States?

Mr. Haynes: It says state, but that would still be out of the jurisdiction of this Court. But it would be the same, we contend, whether they be out or whether they be in a foreign country or a foreign state. Hall vs. State in 65 Tennessee Reports 522 and it has not been overruled or modified to the extent, it held that a person's testimony could not be read as long as that witness was still alive and frankly, this case would modify an earlier case that held that a witnesses testimony couldn't even be read and him dead. This is Hall vs. State. It held that as along as a witness was still alive that it could not be read and we contend that it be true whether they be in another state or country. It wouldn't make very much difference. In this case, it has not been shown that there has been any effort to have Mr. Holmes to come here by anybody. There has been an offer on their part to have us take the deposition so that we could be afforded the right to cross examination. There is no effort apparently [*sic*], on or about the 13th of July, they got a subpoena issued and sent down to Texas and that subpoena was directed to the sheriff of Sullivan County who had no legal force down there in Texas at all. And an unsigned return was [*161] made on that subpoena and sent back. We rely strongly on Hall against the State. It has not been changed, nor has it been modified.

The Court: I don't think that there is anything anything in the code about it gentlemen, if I remember correctly. Or I don't ever remember ever seeing anything. It is . . .

Mr. Haynes: It is a real old case, if Your Honor please. I have Sheapardized [*sic*] this case and it has not been overruled or modified.

The Court: Well, go ahead. I will hear you and then I want to hear the State.

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Counsels' Objections to Reading Former Testimony.

Mr. Haynes: There is one further element in this case that Your Honor should consider and that is, whatever prior testimony that they may offer, the only cross examination that we have here, would be the cross examination that was made ten years ago by attorneys that had only a few days to prepare the defense . . . or one day to prepare their defense. And the Federal Court has already held in the order that Your Honor has seen and they said that the lawyers didn't have sufficient time to prepare their defense and surely, they didn't have time to prepare an adequate cross examination. Now, certainly we can't cross examine them. We can't cross examine a transcript. That is the one thing that they sent this case back to improve. Now, that states our [*162]

The Court: Alright, Mr. Attorney General, what do you have to say?

Mr. Wooten: Your Honor, the Hall vs. State is in 1872 is modified by implication by Section 40-2429 of the Tennessee Code which provides for uniform attendance of the witnesses. At the top of the page in Hall vs. State was yielding . . . was yielded by this statute which now provides the attendance of witnesses anyplace in the jurisdiction or in the District of Columbia. Under this authority, we have no way to compel the attendance of Mr. Holmes. He is beyond the issuing of the judicial processes, not only in the State of Tennessee, but in the United States of America. And for all legal purposes, he is dead. Or at least, he he is dead as far as the State of Tennessee is concerned. Our position is, that his testimony would be admissable [*sic*]. Our further contention is that his testimony would be essential to the prosecution of this case. Now, we have the Court Reporter here that took the testimony and it is available to us only in that manner. We do not think that Hall vs. State is authority at this time.

Mr. Mitchell [Defense Counsel]: Your Honor please, I think it is the law and it is the law until the

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courts speak otherwise. Now, as your Honor recalls, Mr. Wooten stated that he would have Mr. Holmes present . . . [*163]

The Court: Well, we will not argue that point. I want to hear the law, gentlemen. That is what I want. I want to know the law.

Mr. Mitchell: Now, I do want to insist upon this, if Your Honor please could have taken this man's deposition if they wanted to. Now, this man is on trial for his life. I think that they ought to show that they made a reasonable attempt to have him summonends. And I was reading from the newspaper which is not admissable [*sic*], but one of the reporters asked Mr. Holmes if . . .

The Court: Well, let's don't get into the newspaper.

Mr. Mitchell: Well, one of . . .

The Court: I have heard too much already . . .

Mr. Mitchell: I understand, but Mr. Holmes testified about where his father was, yet he was quoted as saying that his father didn't even know that it was being tried. And if that be the case, then I think the State has fallen down on their duty.

The Court: Gentlemen, I think this, I believe that where there is a process whereby they can get witnesses in the United States and there is not a process whereby we can bring those witnesses back from a foeign country, I think that it does make a difference. And I feel like the evidence of the sons of the prosecutor . . . he swore that he was in Sweden and I am going to overrule this and I am going to [*164] let it in. Let the jury come back. Do you want to take that up about the qualifications of the witness and let them hear that.

Mr. Wooten: I believe that it would be competent Your Honor.

The Court: Yeah, let the jury come back" (T. 159-164).

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Elena B. Harris; Williams Charles Stubbs.

ELENA B. HARRIS (T. 164-233) (T. 283-287) was the court reporter who had attended the 1954 trial of William C. Stubbs (T. 165). She had retained her shorthand notes of the former trial (T. 166) and had prepared a transcript of it (T. 167). Again, counsel for the defendant objected to the reading of the testimony from the earlier trial:

> "And we further object on the grounds that this is hearsay. There has been no showing on, no showing of any effort on the part of the State to get this witness here and said defendant will be deprived of the right of cross examination as provided in the Constitution and will be deprived of due process" (T. 173).

The objection was overruled, the transcript was admitted into evidence as an exhibit (T. 174). The remainder of Mrs. Harris' testimony consists in the reading of Mr. Holm's testimony from the 1954 trial with interjections made by the trial judge and counsel at the 1964 trial. This testimony is reproduced in the joint appendix (A. 36-74; 103-105), is discussed in the argument, and thus, need not be summarized here.

WILLIAM CHARLES STUBBS (T. 237-283) the defendant, testified on his own behalf. Since his testimony is fully reproduced in the joint appendix (A. 75-102) it, also, need not be summarized here.

DONALD STUBBS (T. 281-283), the defendant's brother, was called as a witness for the defense, but testified to nothing material.

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Charge of Trial Judge.

CHARGE OF THE TRIAL JUDGE. The instructions to the jury by the trial judge at the 1964 trial contain the following provisions relating to the defense offered:

> "The theory of the defendant in this case is that he did not shoot and kill Mrs. Ruth Holm as charged in the indictment; that when he came to the roadside table where the deceased and her husband, Alex Holm, were eating, he was tired, hungry and broke and wanted a ride to Bristol with them in their car; that when they refused, he took his pistol in his hand and made them get into the car. That he did not intende to rob or shoot them and intended to get out at Bristol and let them go on with their car and other property. That when they went through Rogersville, at the request of Mrs. Holm, he laid the pistol down in the front seat. That when he got to the scene of the shooting, he looked at some people standing on the side of the road and thereupon something struck him on the head and he threw up his hand and heard a loud report; that thereafter, he was dazed, but managed to fall out of the car; that he did not shoot the pistol at either of them and knows nothing about who shot Mrs. Holm, but that he ran away because he knew that Mr. Holm had the pistol and would shoot him;
>
> If you believe the theory of the defendant, or have a reasonable doubt of his guilt, you should acquit him" (T. 298).

APPENDIX B.

ORDER

STUBBS v. BOMAR, reproduced in this appendix, is the order of the United States District Court for the Middle District of Tennessee, which declared null and void the 1954 conviction of William C. Stubbs. This order was introduced at the 1964 Tennessee Trial (T. 153).

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

WILLIAM C. STUBBS,

Petitioner,

v.

LYNN BOMAR, Warden, Tennessee State Penitentiary,

Respondent.

Civil Action 3585.

ORDER

This cause came on to be heard on this the 19th day of December, 1963, before the Honorable William E. Miller, Judge, United States District Court, upon the petition for writ of *habeas corpus* filed by petitioner, William C. Stubbs, answer thereto filed on behalf of respondent, Lynn Bomar,

Warden, Tennessee State Penitentiary, the petitioner being present in Court and represented by counsel, and after a full and complete hearing of the matter, including the testimony of the petitioner and upon consideration of the entire record, the Court is of the opinion that the petition for writ of *habeas corpus* filed in this cause should be granted.

It appears from the record that petitioner Stubbs was arrested in Sullivan County, Tennessee, on the 11th day of June, 1954, for the crimes of murder in the first degree, assault with intent to commit murder and kidnapping (two cases), the alleged offenses having occurred on the same date in Sullivan County, Tennessee.

The evidence and the record further reveals that the petitioner was indicted in the Criminal Court of Sullivan County for the above enumerated offenses on the 8th day of July, 1954, and on the next day, to wit, the 9th day of July, 1954, the petitioner was arraigned before the Trial Judge and at which time three members of the Sullivan County Bar were appointed to represent petitioner Stubbs.

The evidence and the record before the Court shows that petitioner's case was set for trial on the 12th day of July, 1954, at which time Court-appointed counsel representing the petitioner filed a motion for a continuance on the ground that the Court-appointed counsel had not had sufficient time to prepare a defense on behalf of petitioner, and the Court-appointed counsel also filed a motion for a change of venue. Both motions were overruled by the Trial Judge, and the petitioner was put to trial on the 12th day of July, 1954.

The evidence and the record before the Court shows that the State of Tennessee was seeking the death penalty against the petitioner, and the petitioner being an indigent person, the Trial Court appointed a Court reporter, as authorized under the provisions of Section 40-2011 Tennessee Code Annotated. However, the evidence and the record further shows that the Trial proceedings were never transcribed or reduced to writing by the Court reporter. There is likewise some evidence before the Court that the petitioner requested his Court-appointed counsel to appeal his convictions, and his Court-appointed counsel failed to or refused to appeal said convictions on account of the petitioner being an indigent person.

The Court is of the opinion that the evidence and the record show that the Constitutional rights of petitioner Stubbs were violated at the time of his trial in the Criminal Court of Sullivan County in that his Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial, and as a result the petitioner was denied effective representation by counsel. The Court is of the further opinion that the petitioner's Constitutional rights were violated when the petitioner was denied the right to have said convictions and judgments appealed to the Supreme Court of Tennessee on account of the petitioner being an indigent person.

It is therefore ordered, adjudged and decreed by the Court that the convictions and judgments rendered against petitioner Stubbs in the Criminal Court of Sullivan County in July of 1954 be and the same are hereby declared null and void, and said petitioner will be released and dis-

charged from the custody of the respondent as Warden of the Tennessee State Penitentiary.

It is further ordered, adjudged and decreed by the Court that the petitioner, William C. Stubbs, is hereby remanded to the further custody of the Sheriff of Sullivan County for further prosecution by the State of Tennessee, if the State of Tennessee so desires.

The Clerk of the Court is hereby directed to furnish a certified copy of this order to the respondent, Lynn Bomar, as Warden of the Tennessee State Penitentiary, which will be authority for the respondent to release the said petitioner from his custody, and deliver the petitioner to the custody of the Sheriff of Sullivan County. The Clerk of the Court is likewise directed to furnish a certified copy of this order to the Sheriff of Sullivan County which will be the authority for the Sheriff of Sullivan County to receive and take custody of petitioner Stubbs, pending further prosecution by the State of Tennessee.

WILLIAM E. MILLER,
Judge.

Approved for entry:
JAMES L. ROBERTS,
Attorney for Petitioner Stubbs.

HENRY C. FOUTCH,
Assistant Attorney General,
State of Tennessee.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MANCUSI, WARDEN *v.* STUBBS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–237. Argued April 17, 1972—Decided June 26, 1972

New York State sentenced respondent as a second offender, based on his 1964 felony conviction in Tennessee. Respondent's petition for federal habeas corpus, denied by the District Court, was granted by the Court of Appeals which concluded that the Tennessee conviction violated his Sixth and Fourteenth Amendment right to confront witnesses and thus was not available as the predicate for a "second offender" stiffer punishment. The State then resentenced respondent to the same sentence, based upon still another conviction in Texas. *Held:*

1. New York State's resentencing of respondent did not moot the instant case since the respondent's appeal from the Texas conviction is still in the state courts and therefore New York State has a present interest in the availability of the Tennessee conviction as a predicate for the stiffer punishment. Pp. 1–3.

2. Upon discovering that a State's witness had removed himself permanently to a foreign country, the State of Tennessee was powerless to compel his attendance at respondent's second trial, either through its own process or through established procedures depending upon the voluntary assistance of another government; the resultant predicate of unavailability was sufficiently strong not to warrant a federal habeas corpus court's upsetting the State's determination that the witness was not available. *Barber* v. *Page*, 390 U. S. 719, distinguished. Pp. 3–7.

3. Where a State's witness is bona fide unavailable, the requirements of the Confrontation Clause are met when prior-recorded testimony of the witness is admitted, as occurred in the 1964 trial, if that prior testimony bears "indicia of reliability" that would afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Dutton* v. *Evans*, 400 U. S. 74, 89. Pp. 8–11.

442 F. 2d 561, reversed.

Syllabus

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in Part II of which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–237

Vincent R. Mancusi, Warden, Petitioner, *v.* William C. Stubbs. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 26, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Stubbs was convicted of a felony in a New York State court and sentenced as a second offender under the laws of that State by reason of a prior Tennessee murder conviction obtained in 1964. He thereafter sought federal habeas corpus, claiming that the Tennessee conviction was had in violation of his Sixth and Fourteenth Amendment right to confront witnesses against him, and thus could not be used by New York as the predicate for a stiffer punishment. The District Court denied habeas corpus, but the Court of Appeals reversed, 442 F. 2d 561 (CA2 1971). We granted certiorari, 404 U. S. 1014, and reverse for the reasons hereinafter stated.

I

Prior to our consideration of the merits it is necessary to deal with a suggestion that because the State did not seek a stay of the mandate of the Court of Appeals, but rather obeyed it, and resentenced Stubbs, this case is therefore moot. The parties agreed at oral argument that Stubbs upon resentencing in New York had received the same sentence, based upon still another conviction in Texas. However, he was appealing from that sentence on grounds that the Texas conviction was constitutionally

infirm, and that appeal has not run its course even through the state courts.

Until it can be said with certainty that New York may validly resentence respondent to the same term as it imposed prior to the decision of the Court of Appeals now under review here, New York continues to have an interest in the availability of the Tennessee conviction as a support for second offender sentencing of respondent. The State's obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case.[1] In *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437 (1948), the union appealed from an injunction issued by the United States District Court on the ground that it had been issued in violation of the provisions of the Norris-LaGuardia Act. Dealing with a

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[1] The dissent states that this case is controlled by *SEC* v. *Medical Committee*, — U. S. —. In that case respondent committee had requested Dow Chemical to place the committee's proposed resolution on the proxy statement for the annual meeting of Dow Chemical stockholders. Dow Chemical initially refused the request, and the committee thereupon invoked the aid of the SEC to bring suit against Dow Chemical to compel inclusion of the proposal. The SEC refused to bring suit, and the committee then succeeded in having the agency's refusal set aside by the Court of Appeals. While review of this latter action was pending here, Dow Chemical acceded to the committee's request. The committee thereby accomplished the purpose for which it sought ancillary assistance from the SEC, not because of compliance by the SEC with the judgment under review, but because of the action of Dow Chemical which was not required to do anything by that judgment.

There would be a rough parallel between our case and *SEC* v. *Medical Committee* if, pending review here of the ruling of the Court of Appeals in favor of Stubbs, the Governor of New York should pardon Stubbs. But on the facts we have before us now, the mootness issue is controlled by *Bakery Drivers* and *Dakota County, infra*, rather than by *SEC* v. *Medical Committee*.

"preliminary claim" of mootness in that case, the Court said:

> "The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review. We therefore turn to the merits." 333 U. S., at 442.

Much earlier the Court had stated a similar view of mootness in these circumstances:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal." *Dakota County* v. *Glidden*, 113 U. S. 222, 224 (1885).

Under these authorities the case is not moot, and we turn to the merits.

II

In July 1954, respondent was convicted in the Tennessee trial court of murder in the first degree, assault with intent to murder, and two counts of kidnapping. The jury empaneled for that trial could have concluded from the evidence presented to it that respondent, a few

days after his release from a Texas penitentiary in June 1954, kidnapped Mr. and Mrs. Alex Holm and forced them at gun point to accompany him in their car. Stubbs drove the car and sat in the front seat, while the Holms sat in the back seat. Mr. Holm testified that somewhere east of Blountville, Tennessee, Stubbs, without saying anything, shot him twice in the head and shot and killed Mrs. Holm. Stubbs then left the car, obtained a ride as a hitchhiker, and was ultimately arrested at a roadblock. At the time of his arrest, Stubbs explained the blood on his clothing as having resulted from his having fallen off a cliff while fishing.

Stubbs took the stand in his own defense, admitted that he had kidnapped the Holms at gun point, and that as he drove the Holms' car with them in the back seat he at intervals pointed the gun in Mrs. Holm's face. He testified that during the ride he apologized for forcing a ride; that the Holms then assured him they would let him out at Bristol, Tennessee, and would not cause him any trouble, and that he therefore laid the pistol on the front seat of the car. He also testified that near Bristol, Tennessee:

> "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in a clear focus but in a reddish haze. I mean there was no pain or nothing, . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and heard this loud roar, bang . . . Stuff started down my face and down my shirt and all that I could think of is that he has got the gun . . . I just went outside through the car door . . ."

After that, Stubbs testified, "everything went black."

Nine years after his state court trial for murder, Stubbs sought release on federal habeas corpus from the United States District Court for the Middle District of Tennessee.

He successfully urged upon that court the contention that he had been denied the effective assistance of counsel in this 1954 trial because counsel had been appointed for him only four days before the trial took place. *Stubbs* v. *Bomar*, Civil Action No. 3585 (MD Tenn. 1964). The State of Tennessee then elected to retry him, and did so in 1964. At that time Holm, who had been born in Sweden but had become a naturalized American citizen, had returned to Sweden and taken up permanent residence there. Tennessee issued a subpoena that was sent to Texas authorities in an attempt to serve Holm at at his last known United States address. No service having been obtained, the State at trial called Holm's son as a witness and elicited from him the fact that his father now resided in Sweden. Over appropriate objection on constitutional grounds, the Tennessee trial judge then permitted Holm's testimony at the earlier trial to be read to the jury. Stubbs again took the stand, recited his version of the events, and was again convicted. This conviction was in due course affirmed by the Supreme Court of Tennessee. *Stubbs* v. *State*, 216 Tenn. 567, 393 S. W. 2d 150 (1965).

Respondent has challenged the present second offender sentence that was imposed upon him by the New York courts on the ground that his 1964 conviction upon retrial was constitutionally infirm because he was denied his Sixth and Fourteenth Amendment right to confront the witness Holm. The Court of Appeals sustained this contention, relying on this Court's opinion in *Barber* v. *Page*, 390 U. S. 719 (1968).

In *Barber*, a prospective witness for the prosecution

in an Oklahoma felony trial was incarcerated in a federal prison in Texas. The court there said:

> "We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma. It must be acknowledged that various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that 'it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction; and the party desiring his testimony is therefore helpless.' 5 Wigmore, Evidence § 1404 (3d ed. 1940).
>
> "Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law. For example, in the case of a prospective witness currently in federal custody, 28 U. S. C. § 2241 (c)(5) gives federal courts the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities. [Citations omitted.] In addition, it is the policy of the United States Bureau of Prisons to permit federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus *ad testificandum* issued out of state courts . . . .
>
> "In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial." (Footnotes omitted.) *Barber v. Page*, 390 U. S., at 723–724.

Because the State had made no attempt to use one of these methods to obtain the attendance of the witness at trial, the Court reversed the conviction on that ground without considering whether the testimony taken at the preliminary hearing was subject to cross-examination. The Court said:

> "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See *Motes* v. *U. S.*, 178 U. S. 458 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case." 390 U. S., at 725–726.

In this case, of course, Holm was not merely absent from the State of Tennessee; he was a permanent resident of Sweden. Respondent argues that Tennessee might have obtained Holm as a trial witness by attempting to invoke 28 U. S. C. § 1783 which provided as of the time here relevant that:

> "A court of the United States may subpoena, *for appearance before it*, a citizen or a resident of the United States who . . . is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General . . . ." (Emphasis supplied.)

We have been cited to no authority applying this section to permit subpoena by a federal court for testimony in a state felony trial, and certainly the statute on its face does not appear to be designated for that purpose.[2]

The Uniform Act to secure the attendance of witnesses from without a State, the availability of federal writs of habeas corpus *ad testificandum*, and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus *ad testificandum*, all supported the Court's conclusion in *Barber* that the State had not met its obligations to make a good-faith effort to obtain the presence of the witness merely by showing that he was beyond the boundaries of the prosecuting State. There have been, however, no corresponding developments in the area of obtaining witnesses between this country and foreign nations. Upon discovering that Holm resided in a foreign nation, the State of Tennessee so far as this record shows was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government. Cf. *People* v. *Trunnel*, 19 Cal. App. 3d 567, 96 Cal. Rptr. 810 (1971). We therefore hold that the predicate of unavailability was sufficiently stronger here than in *Barber* that a federal habeas court was not warranted in upsetting the determination of the state trial court as to Holm's unavailability. Before it can be said that Stubbs' constitutional right to confront witnesses was not infringed, however, the adequacy of Holm's examination at the first trial must be taken into consideration.

[2] Stubbs argues that the 1964 amendment to 28 U. S. C. § 1783, authorizing a subpoena to bring a witness "before a person or body designated by" the District Court, sheds a different light on this case. That amendment was not available to the Tennessee authorities for Stubbs' 1964 trial, and therefore we have no occasion to decide whether it would afford assistance to state authorities on the facts represented by this case.

In addition to *Barber* v. *Page*, recent decisions of this Court that have dealt at some length with the requirements of the Confrontation Clause are *California* v. *Green*, 399 U. S. 149 (1970), and *Dutton* v. *Evans*, 400 U. S. 74 (1970). The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton* v. *Evans*, *supra*, at 89, and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California* v. *Green*, *supra*, at 161. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these "indicia of reliability" referred to in *Dutton*.

At least since the decision of this Court in *Mattox* v. *United States*, 156 U. S. 237 (1895), prior recorded testimony has been admissible in appropriate cases. The circumstances surrounding the giving of Alex Holm's testimony at the 1954 trial were significantly more conducive to an assurance of reliability than were those obtaining in *Barber* v. *Page*, *supra*. The 1954 Tennessee proceeding was a trial of a serious felony on the merits, conducted in a court of record before a jury, rather than before a magistrate.[3] Stubbs was represented by counsel who could and did effectively cross-examine prosecution witnesses.

Stubbs urges that because the 1954 conviction was itself overturned by a federal habeas court on a finding of ineffective assistance of counsel, that court must necessarily have concluded that the cross-examination

[3] The significant difference between the nature of examination at a preliminary hearing and at a trial on the merits is discussed both in *Barber* v. *Page*, *supra*, and in MR. JUSTICE BRENNAN's dissenting opinion in *California* v. *Green*, 399 U. S. 149, 196–199.

of Holm conducted by such counsel likewise fell short of constitutional standards. The federal habeas judge in *Stubbs* v. *Bomar, supra,* however, rested his determination on an apparent *per se* rule of ineffective assistance that was conclusively presumed from the short interval between the time of counsel's appointment and the date of the trial. If the habeas court had rendered its decision after our holding in *Chambers* v. *Maroney,* 399 U. S. 42 (1970), which disapproved any such *per se* rule, it might have addressed itself to the effectiveness of the examination of the witness Holm. But it did not in fact do so. When Stubbs appealed his 1964 conviction to the Supreme Court of Tennessee, that court in affirming the judgment expressly determined that the prior cross-examination of Holm had been adequate. *Stubbs* v. *State,* 216 Tenn. 567, 393 S. W. 150 (1967). Whatever might be the case in other circumstances, the State of New York was not bound under any theory of *res judicata* by *Stubbs* v. *Bomar* as to the efficacy of the prior cross-examination of the witness Holm.

Stubbs also contends that even though the prior determination may not be binding upon subsequent review, the fact that counsel was appointed only four days before trial necessarily requires a finding that the cross-examination of Holm was constitutionally inadequate. Counsel for Stubbs at the 1964 trial placed in the record a list of 12 questions not asked of Holm in 1954, which he said he would have asked had the witness been present at the second trial. With one exception these were directed to the events leading up to and surrounding the shooting. Though not asked *in haec verba* in 1954, they were nonetheless adverted to in the earlier cross-examination. No one defense counsel will ever develop precisely the same lines of inquiry or frame his questions in exactly the words of another, but from this record counsel at the retrial did

not in his proffer show any new and significantly material line of cross-examination that was not at least touched upon in the first trial.

The Court of Appeals concluded that the cross-examination had been inadequate. It reached this conclusion at least in part because it felt that Holm could have been questioned about whether Stubbs, although originally having kidnapped the Holms at gun point, later became in effect their guest. Parts of Stubbs' own testimony presented that version of the events to the jury, and the Second Circuit thought it significant because even if Stubbs fired his pistol accidentally, he might still have been found guilty of felony murder unless the felony of kidnapping had ended. Under this theory if Stubbs had during the trip been transmogrified from a kidnapper into a guest, at least the argument to the jury as to whether the kidnapping had ended before the shooting would have been strengthened by any support Holm's testimony might have given to this notion.

The Tennessee trial court, however, did not charge that the jury could convict Stubbs of felony murder as a result of a death occurring during a kidnapping. Its charge authorized conviction upon a finding of premeditated murder, or upon a finding of murder during the commission of robbery.[4] The failure to elicit from Holm his own views as to whether Stubbs had become a guest in the Holm car prior to the time that he turned from the front seat, shot Mr. Holm, and killed Mrs. Holm—however interesting they might have been to

[4] This was in accord with the Tennessee felony murder statute which provides:

"Every murder . . . committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, or larceny, is murder in the first degree." Tenn. Code Ann. § 39–2402.

hear—could not have prejudiced Stubbs' case as to any issue that the jury was authorized to deliberate under the trial judge's charge.

Since there was an adequate opportunity to cross-examine Holm at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient "indicia of reliability" and afforded "the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *Dutton* v. *Evans*, 400 U. S. 74, 89. The witness Holm, consistently with the requirement of the Confrontation Clause, could have been and was found by the trial court to be unavailable at the time of the second trial. There was therefore no constitutional error in permitting his prior recorded testimony to be read to the jury at that trial, and no constitutional infirmity in the judgment of conviction resulting from that trial that would prevent the State of New York from considering that conviction in sentencing Stubbs as a second offender. The judgment of the Court of Appeals is therefore

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71–237

Vincent R. Mancusi, Warden, Petitioner, v. William C. Stubbs. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 26, 1972]

MR. JUSTICE MARSHALL, dissenting.

I

I would dismiss the writ in this case as improvidently granted. The question presented to the courts below concerns the constitutional validity of a 1964 Tennessee conviction. The New York courts had relied on that conviction to sentence respondent as a multiple offender, after his conviction in 1966 for a New York offense. It was conceded at oral argument, however, that New York has no present interest whatever in that Tennessee conviction. For after the United States Court of Appeals held that it was constitutionally defective, New York substituted for the Tennessee conviction an earlier Texas conviction, and reinstated precisely the same enhanced sentence it had previously imposed.[1]

[1] Under the then-applicable New York sentencing statute, former N. Y. Penal Law § 1941, one prior conviction was sufficient to trigger the recidivist sentencing provisions, and Stubbs received the maximum authorized recidivist sentence. New York has subsequently amended its law to increase the maximum recidivist sentence, and to provide that two prior convictions are necessary to trigger the recidivist statute, N. Y. Penal Law § 70.10. The new provisions do not, however, apply to this case, because the underlying New York conviction here was obtained before the effective date of the new statute. N. Y. Penal Law § 5.05.

In determining that this case is nevertheless appropriate for adjudication here, the Court seems to rely on two separate factors. First, it reasons that the event that seems to moot the case—the resentencing—was merely the State's obedience to the adverse judgment below, and for that reason cannot moot the controversy. And second, it reasons that the resentencing may prove to be defective as a matter of law, that New York may in the future wish to rely on the Tennessee conviction again, if the Texas conviction should prove to have defects of its own.

The first proposition falls wide of the mark in this case. It is well established that an unsuccessful litigant does not moot his case by complying with an unfavorable judgment pending the disposition of his appeal. Thus, a debtor does not moot his case by paying the judgment against him *pendente lite*. *Dakota County* v. *Glidden*, 113 U. S. 222 (1885). And if a union is enjoined from boycotting or striking at a particular store, the union does not moot the case by lifting the boycott or strike *pendente lite*. *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437 (1948). But that principle does not protect the unsuccessful litigant who goes beyond what is required of him, and obtains relief in some way not prohibited by the judgment against him. Thus the debtor *does* moot his case by entering into a compromise in settlement of the debt. *Dakota County* v. *Glidden*, 113 U. S., at 224–227. And the union might well moot its case if all the striking employees left the store and obtained other employment elsewhere.

This case would come within the principle of *Dakota County* and *Bakery Drivers*, if New York had simply abandoned, temporarily, its attempt to impose an enhanced recidivist sentence, pending review of the judgment below. But New York did more than merely submit to the decision below; it found a complete sub-

stitute for the result it had sought in the Court of Appeals, and the result it continues to seek here.[2] By reversing the judgment below, this Court gives New York no relief it has not already obtained.

The Court offers a second reason to disregard the resentencing in this case, however, and that reason is perhaps independent of the first. The Court argues that the Texas conviction, and the resentencing based on it, may be found invalid in other proceedings, in which case New York may wish to revive its interest in the Tennessee conviction. Thus the argument rests on the Court's estimate that the controversy which gave rise to this litigation has a substantial probability of recurring. That analysis might in my view carry considerable weight, if it were applied uniformly in all cases. But this Court has regularly refused to adjudicate the claims of litigants who argue that illegal action will probably harm them in the future. *E. g., Socialist Labor Party* v. *Gilligan*, — U. S. — (1972); *SEC* v. *Medical Committee*, 404 U. S. 403 (1972).[3] Moreover, in this case the Court can find that the controversy will

[2] The Court seeks to distinguish *SEC* v. *Medical Committee*, 404 U. S. 403 (1972), on the ground that in that case the action relied on to moot the case was taken by a third party rather than by a litigant. I can see no relevant difference, however, between the action of a third party, and the action of a litigant which goes beyond mere *pendente lite* compliance with the court order, so long as that action gives the litigant the relief he seeks. If burning down a building will moot a case, surely that is so whether the fire is set by a litigant or a lightning bolt, though the litigant may of course be subject to sanctions quite apart from the case he has rendered moot.

[3] Indeed, the claim we rejected in *SEC* is closely analogous to the claim here. In each case, events subsequent to the decision below removed the occasion for present conflict between the parties, but it was alleged that within a short time the conflict could be expected to recur. In *SEC*, the Court found that allegation too speculative to keep the controversy alive.

probably recur only by presuming that the Texas conviction is probably invalid. Such a presumption flies in the face of the principle that state convictions are ordinarily presumed valid.[4] The Court betrays a surprising lack of confidence in the criminal processes of our States, for which there is no warrant in this record.

In these circumstances, the possibility that this controversy will be revived is too remote and speculative to keep the case alive under established precedents. It is certainly too remote and speculative to warrant invoking the discretionary certiorari jurisdiction of this Court.

II

Because the Court reaches out to decide the merits of this case, I think it appropriate to state my views on that subject as well.

Respondent was convicted of murder in Tennessee after a trial in which the principal prosecution witness, one Axel Holm, did not appear. Instead, Holm's testimony was introduced through a transcript of a previous trial on the same charge. The State made absolutely no effort to secure Holm's presence at the second trial, relying wholly on the claim that Holm was unavailable because he had become a resident of Sweden. The Court today concludes that the State did not thereby deny Stubbs his right "to be confronted with the witnesses against him," guaranteed by the Sixth and Fourteenth Amendments. To reach that result, the Court necessarily distinguishes our holding in *Barber* v. *Page*, 390

[4] Even when an appeal is pending, see, *e. g.*, *Bloch* v. *United States*, 226 F. 2d 185, 188 (CA9 1955), cert. denied, 350 U. S. 948 (1956); *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (CA7), cert. denied, 337 U. S. 959 (1956); Proposed Rules of Evidence for the United States District Courts § 6,09 (d), and Advisory Committee's Note.

U. S. 719 (1968), on untenable grounds, and utterly ignores its rationale.

In *Barber* v. *Page*, the petitioner had been convicted on the basis of testimony introduced through a transcript of a preliminary hearing. The witness in question was incarcerated in a federal prison. We held that the State could not, consistent with constitutional requirements use that transcript in lieu of the witness himself, unless two conditions were met: (1) the witness was shown to be actually unavailable to testify at trial, and (2) the witness had been adequately confronted and cross-examined at the prior hearing. In *Barber* we concluded that neither condition had been met; the State had failed to make a good-faith effort to secure the presence of the witness at trial, and hence it could not be said that the witness was unavailable; moreover, the preliminary hearing did not afford an adequate pretrial opportunity for confrontation and cross-examination.

The Court purports to apply the two-part test of *Barber* to the facts of this case. It devotes considerable space to the second part of the test, analyzing the opportunity for confrontation and cross-examination of Holm at the first trial of Stubbs, and concluding that the opportunity there was significantly greater than at the preliminary hearing in *Barber*. The Court's distinction for this purpose between a preliminary hearing and a prior trial is tenable, in my view, although on the peculiar facts of this case the Court's conclusion is somewhat troublesome. But the Court fails totally to explain how the first part of the *Barber* test is satisfied here. On that question, the Court has only this to say: "the predicate of unavailability was sufficiently stronger here than in *Barber* that a federal habeas court was not warranted in upsetting the determination of the state trial court as to Holm's unavailability."

The difficulty with that position is that there never has been any factual inquiry resulting in a determination as to Holm's unavailability. Rather, the courts have consistently presumed his unavailability from the bare fact that he lives in Sweden. The Tennessee Supreme Court thought it was enough that Holm was out of the jurisdiction of the United States, beyond the reach of compulsory process, *Stubbs* v. *State*, 216 Tenn. 567, 574–575, 393 S. W. 2d 150, 153–154 (1965), as it did the dissenting judge in the United States Court of Appeals, 442 F. 2d 561, 565 (1971). Apparently this Court takes the same view. But in *Barber* v. *Page* we squarely rejected any such presumption of unavailability. In that case, the claim was made that the court had no power to compel the absent witness to appear. We held that nevertheless the State was obliged to make a good faith effort to secure his appearance, for "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." 390 U. S., at 724, quoting the decision below, 381 F. 2d 479, 481 (CA10 1966) (Aldrich, J., dissenting). As we said in *Barber:*

> "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." 390 U. S., at 724–725.

The Court seeks to distinguish *Barber* on the ground that in that case the absent witness was a federal prisoner, and while the State had no power to compel his appearance, it could at least have sought the cooperation of the federal prison authorities who did have such power. Here, on the other hand, the absent witness was a resident of a foreign nation, and hence it is argued that even federal authorities would have no power to help. In support of that analysis, the Court seems to

place substantial reliance on the fact that at the time of Stubbs' trial, the federal courts had statutory power to subpoena American citizens living abroad, but that power was apparently available only to compel their appearance before federal courts. Act of June 25, 1948, c. 646, 62 Stat. 949, as amended 28 U. S. C. § 1783 (1970). If the Court's decision today does in fact rest on the lack of federal power to compel the appearance of Holm at a state trial, then the holding in this case is of very limited significance. For less than three months after the trial of Stubbs, Congress amended § 1783 to provide:

> "A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, *or before a person or body designated by it*, of a national or resident of the United States who is in a foreign country . . . ." Act of Oct. 3, 1964, Pub. L. No. 88–619, § 10 (a), 78 Stat. 997 (emphasis added).

Since October 3, 1964, then, it appears that the federal courts have had the power to assist state courts in securing the presence of witnesses like Axel Holm, and hence for trials occurring since that date, *Barber* would seem to control.

I cannot agree, however, that if neither state or federal authorities had the power to compel Holm's appearance, that fact relieved the State of its obligation to make a good-faith effort to secure his presence. It simply reduced the likelihood that any effort would succeed. The State's obligation would hardly be framed in terms of "good-faith effort" if that effort were required only in circumstances where success was guaranteed. If, as the Court contends, it is more difficult to produce at trial a resident of Sweden than a federal prisoner, that fact might justify a failure to produce

the witness; it cannot justify a failure even to try. At a minimum, the State could have notified Mr. Holm that the trial was scheduled, and invited him to come at his own expense. Beyond that, it could have offered to pay his expenses. Finally, it could have sought federal assistance in invoking the cooperation of Swedish authorities, as a matter of international comity.

As in *Barber*, "so far as this record reveals, the sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly."

I respectfully dissent.

MR. JUSTICE DOUGLAS joins in Part II of this opinion.